BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

ACCELERATING WIRELESS BROADBAND DEPLOYMENT BY REMOVING BARRIERS TO INFRASTRUCTURE INVESTMENT	))))	WT Docket No. 17-79

COMMENTS OF SMART COMMUNITIES AND SPECIAL DISTRICTS COALITION

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June 15, 2017

SUMMARY OF COMMENTS OF THE SMART COMMUNITIES AND SPECIAL DISTRICTS COALITION

The Smart Communities and Special Districts Coalition ("Smart Communities") is comprised of individual localities, special districts, and local government associations that collectively represent over 31 million residents in 11 states and the District of Columbia. Collectively, Smart Communities have significant experience in addressing the placement of wireline and wireless facilities, including wireless deployments from very large structures and monopoles to relatively small wireless structures.[1] Smart Communities have devoted significant community resources to undergrounding utilities and other economic development projects, whose job-creating success depends on balancing the needs of local businesses, utilities, residents, consumers and tourists – all while maintaining the safety and integrity of private and public infrastructure located within their communities.

Moreover, Smart Communities interact on a daily basis with wireless industry participants in their role as owners of public rights-of-way, parks, street lights, water towers and tanks as well as other proprietary infrastructure routinely used to support commercial wireless facilities. Smart Communities thus bring to this proceeding a unique understanding of the challenges and rewards of siting wireless facilities and leasing space for their deployment, including the next generation of wireless services and infrastructure. Based on our experience, Smart Communities believe that no additional federal regulations are required at this time, and the Commission need not, should not and cannot pursue the proposals in the NOI.

Local governments want and support wireless infrastructure, including small cells that will one day support 5G in order to meet the connectivity needs of their residents and businesses.

[1] Smart Communities is also filing comments in the Commission's companion wireline proceeding (WC Docket No. 17-84).

This rulemaking improperly assumes the presence of local barriers to deployment.

Public-private cooperation is working at the local level. There is no need for new rules aimed at local governments as the *Mobilitie* docket documented that local siting processes and requirements are not barriers to wireless broadband deployment. And, expert reports filed in the *Mobilitie* docket, and refiled here, demonstrate new rules could be counterproductive.

The Commission should promote cooperative efforts and share creative solutions or models through efforts such as the Commission's Broadband Deployment Advisory Council ("BDAC") and other initiatives rather than mandate a top down, one size fits all, set of national rules that will in the end be counterproductive.

The Commission could expedite the deployment of wireless infrastructure deployment by recognizing and addressing problems its existing rules have created. For instance, Section 6409's "insubstantial" changes are at times outlandishly large and the new shot clock rules reward incompetence to the detriment of providers that comply with application requirements. Outdated RF emissions standards create a barrier to public acceptance of widespread small cell deployment.

The Commission lacks a legal basis for adopting "deemed granted" remedies under section 332(c)(7) and shortening shot clocks will drive up costs. Neither result will enhance wireless infrastructure deployment.

Regarding the NOI section of the proceeding, we submit that Section 253 does not apply to wireless deployments and if broadband is reclassified as an information service as contemplated by the current majority of the Commission, Section 253 would not apply at broadband. There is still no need, and limited authority, for the Commission to clarify the established meaning of "prohibit or have the effect of prohibiting" in Sections 253 and 332(c)(7).

The Commission should reaffirm its 2014 Infrastructure Order's clear and proper distinction between state and local governments' regulatory roles versus their proprietary roles as "owners" of public property and resources, and not pursue the other proposals contemplated by the NOI.

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COMMENTS OF SMART COMMUNITIES AND SPECIAL DISTRICTS COALITION

I. INTRODUCTION

The Smart Communities and Special Districts Coalition ("Smart Communities")[2] is comprised of individual localities, special districts, and local government associations that collectively represent over 31 million residents in 11 states and the District of Columbia.[3]

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[2] The Smart Communities and Special Districts Coalition is comprised of members of the Smart Communities Siting Coalition which was originally formed to participate in the Mobilitie Petition docket (WT Docket No. 16-421), plus additional communities and special districts who have joined to participate in this proceeding and the Commission's companion wireline proceeding (WC Docket No. 17-84). The full membership of the Smart Communities and Special Districts Coalition is listed in FN 2 below.

[3] Individual members: Ann Arbor, MI; Atlanta, GA; Berlin, MD; Berwyn Heights, MD; Boston, MA; Capitol Heights, MD; Cary, NC; Chesapeake Beach, MD; College Park, MD; Corona, CA; Dallas, TX; District of Columbia; Elsinore Valley Municipal Water District (CA); Frederick, MD; Gaithersburg, MD; Greenbelt, MD; LaPlata, MD; Laurel, MD; City of Los Angeles, CA; Marin Municipal Water District (CA); McAllen, TX; Montgomery County, MD; Myrtle Beach, SC; New Carrollton, MD; North County Fire Protection District (CA); Ontario, CA; Padre Dam Municipal Water District (CA); Perryville, MD; Pocomoke City, MD; Poolesville, MD; Portland, OR; Rockville, MD; Rye, NY; Santa Clara, CA; Santa Margarita Water District (CA); Sweetwater Authority (CA); Takoma Park, MD; University Park, MD; Valley Center Municipal Water District (CA); Westminster, MD and Yuma, AZ.

Organizations Representing Local Governments: Texas Coalition of Cities for Utility Issues (TCCFUI) is a coalition of more than 50 Texas municipalities dedicated to protecting and supporting the interests of the citizens and cities of Texas with regard to utility issues. The Coalition is comprised of large municipalities and rural villages. The Michigan Coalition to Protect Public Rights-of-Way ("PROTEC") is an organization of Michigan cities that focuses on protection of their citizens' governance and control over public rights-of-way. The Michigan Townships Association ("MTA") promotes the interests of 1,242 townships by fostering strong, vibrant communities; advocating legislation to meet 21st century challenges; developing knowledgeable township officials and enthusiastic supporters of township government; and encouraging ethical practices of elected officials. The Public Corporation Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan, comprised of approximately 610 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. The Public Corporation Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The position expressed in this Brief is that of the Public Corporation Law Section only. The State Bar of Michigan takes no position. The Michigan Municipal League ("MML") is a non-profit Michigan corporation whose purpose is the improvement of municipal government. Its membership includes 524 Michigan

Collectively, Smart Communities have significant experience in addressing the placement of wireline and wireless facilities, including wireless deployments that involve very large structures and monopoles, as well as relatively small wireless structures. As importantly, many of the members have devoted significant resources to undergrounding utilities or to other redevelopment projects whose job-creating success depends on balancing the needs of local businesses, utilities, residents, consumers and tourists – all while maintaining the safety and integrity of infrastructure communications and other private and public infrastructure located in their public rights-of-way. As owners of public rights-of-way, parks, street lights, water towers, city and township halls and other proprietary infrastructure routinely used by the wireless industry for placement of wireless facilities, Smart Communities interact on a daily basis with wireless industry participants. Smart Communities thus have a good understanding of siting wireless facilities, leasing space for their deployment, and the challenges presented, or that will be presented, by new generation wireless deployments.

In addition to these comments, Smart Communities are also filing comments in the Commission's companion wireline proceeding (WC Docket No. 17-84).

II. SUMMARY

The Smart Communities and Special Districts Coalition ("Smart Communities") is comprised of individual localities, special districts, and local government associations that collectively represent over 31 million residents in 11 states and the District of Columbia. Collectively, Smart Communities have significant experience in addressing the placement of wireline and wireless facilities, including wireless deployments from very large structures and

local governments, of which 478 are members of the Michigan Municipal League Legal Defense Fund. The purpose of the Legal Defense Fund is to represent MML member local governments in litigation of statewide significance. The Kitch Firm represents PROTEC, MML, MTA and Public Corporation Law Section of the State Bar of Michigan. Best Best & Krieger represents the others in the Smart Communities coalition.

monopoles to relatively small wireless structures.[4] Smart Communities have devoted significant community resources to undergrounding utilities and other economic development projects, whose job-creating success depends on balancing the needs of local businesses, utilities, residents, consumers and tourists – all while maintaining the safety and integrity of private and public infrastructure located within their communities.

Moreover, Smart Communities interact on a daily basis with wireless industry participants in their role as owners of public rights-of-way, parks, street lights, water towers and tanks as well as other proprietary infrastructure routinely used to support commercial wireless facilities. Smart Communities thus bring to this proceeding a unique understanding of the challenges and rewards of siting wireless facilities and leasing space for their deployment, including the next generation of wireless services and infrastructure. Based on our experience, Smart Communities believe that no additional federal regulations are required at this time, and the Commission need not, should not and cannot pursue the proposals in the NOI.

Local governments want and support wireless infrastructure, including small cells that will one day support 5G in order to meet the connectivity needs of their residents and businesses. This rulemaking improperly assumes the presence of local barriers to deployment.

Public-private cooperation is working at the local level. There is no need for new rules aimed at local governments as the *Mobilitie* docket documented that local siting processes and requirements are not barriers to wireless broadband deployment. And, expert reports filed in the *Mobilitie* docket, and refiled here, demonstrate new rules could be counterproductive.

The Commission should promote cooperative efforts and share creative solutions or

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models through efforts such as the Commission's Broadband Deployment Advisory Council ("BDAC") and other initiatives rather than mandate a top down, one size fits all, set of national rules that will in the end be counterproductive.

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The Commission lacks a legal basis for adopting "deemed granted" remedies under section 332(c)(7) and shortening shot clocks will drive up costs. Neither result will enhance wireless infrastructure deployment.

Regarding the NOI section of the proceeding, we submit that Section 253 does not apply to wireless deployments and if broadband is reclassified as an information service as contemplated by the current majority of the Commission, Section 253 would not apply at broadband. There is still no need, and limited authority, for the Commission to clarify the established meaning of "prohibit or have the effect of prohibiting" in Sections 253 and 332(c)(7). The Commission should reaffirm its 2014 Infrastructure Order's clear and proper distinction between state and local governments' regulatory roles versus their proprietary roles as "owners" of public property and resources, and not pursue the other proposals contemplated by the NOI.

PART 2: NOTICE OF PROPOSED RULEMAKING

I. ADDITIONAL RULES ARE NOT NEEDED OR APPROPRIATE

A. The NPRM Improperly Assumes Presence of Local Government Barriers

The stated purpose of the NPRM is to "examine regulatory impediments to wireless infrastructure investment and deployment and seek comment on measures to help remove or reduce such impediments."[5] The NPRM then asks parties to "submit facts and evidence on the issues" raised in the proceeding, including "the prevalence of barriers."[6] Smart Communities is troubled that the NPRM – *simultaneously and without making any preliminary findings that its current rules are ineffective or unfair in application; or that there are unlawful delays to address; and without identifying specific examples where the delays the Commission considers unreasonable are the result of actions of the localities, as opposed to applicants* - proposes measures and seeks input on whether those or other measures "are likely to be effective in further reducing unnecessary and potentially impermissible delays and burdens on wireless infrastructure deployment associated with State and local siting review processes."[7]

Smart Communities is concerned that this approach intimates a level of pre-judgment that facts and evidence not yet submitted *will* show there are barriers, or worse, that facts and evidence demonstrating no such barriers exist will be ignored. Members of this coalition, their experts and other local public agencies submitted substantial facts and evidence in the Mobilitie docket[8] which demonstrated that where delay has been documented, the vast majority of delay

[5] Notice of Proposed Rulemaking, WT Docket No. 17-79, FCC 17-38 (April 21, 2017) ("NPRM"), ¶ 4.

[6] NPRM ¶ 6 (emphasis added).

[7] NPRM ¶ 6.

[8] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421 ("Mobilitie docket"). The comments filed by Smart Communities in the Mobilitie docket are referred to herein as Mobilitie Docket Smart Communities Comments (filed March 8, 2017) and Mobilitie Docket Smart Communities Reply Comments (filed April 7, 2017).

can be attributed to incomplete applications and siting requests that are improperly made, not to local barriers.

We trust that the Commission is not and will not prejudge the issues, or ignore the facts and evidence submitted in this docket and in the *Mobilitie* docket. Those facts will show that local processes and requirements are ***not*** barriers to wireless investment, and there is no need for, or legal basis for additional rules limiting local discretion. We say this with some confidence because the Commission received extensive filings from industry and public agencies in the Mobilitie docket.[9] The potential overlaps between that proceeding and this one were acknowledged in the NPRM, and the Commission has invited parties to resubmit relevant information in this docket.[10] But as to establishing a predicate for any Commission action to remove barriers to wireless broadband deployment by adopting additional rules restricting local governments, the *Mobilitie* docket fell woefully short.

B. Expert Reports Support the Conclusion that No New Rules Aimed at Local Governments Are Needed and Could Be Counter-Productive.

In the Mobilitie docket, members of this coalition submitted numerous expert reports,[11] which we resubmit in this filing to support the assertion that no new rules aimed at local governments are needed and could be counter-productive.[12] By contrast, the industry made

[9] In the Mobilitie docket, as of June 12, 2017, there were 882 comments, 47 replies, and 47 *ex parte* notices filed.

[10] NPRM ¶ 8, fn. 9.

[11] *See* exhibits to Mobilitie Docket Smart Communities Comments and Mobilitie Docket Smart Communities Reply Comments, also included in this filing.

[12] The materials and expert reports cited in the Comments of Smart Communities and Special Districts Coalition in the Commission's companion wireline proceeding (WC Docket No. 17-84) provide additional support for some of the principles discussed in this filing.

mention of just one report, which was fully rebutted by Smart Communities' experts in reply comments.[13]

The expert reports resubmitted in the Mobilitie docket, and resubmitted with these comments show, among other things, that:

- small cells can have significant impacts on safety and on property values, because small cells are not necessarily small.[14]
- while many localities are making significant efforts to accommodate small cells, the applications are often not properly prepared, sometimes lacking even basic engineering analysis, and therefore require multiple submissions and resubmissions.[15]
- there is a significant expense associated with reviewing the applications that needs to be recovered.[16]
- allowing localities to recover costs and obtain fair market value for property used will actually enhance deployment, and ensure that advanced systems are deployed in a rational way.[17]
- There is no reason to suppose charging less than market rates for public property will lead to deployment of 5G or advanced systems in a rational way.[18]

C. **The Mobilitie Docket Established No Predicate for Action.**

[13] In the Mobilitie docket, the industry did not submit expert reports or analyses to back their claims, but some in the industry may point to an Accenture Strategy study, filed in a January 13, 2017 ex parte by CTIA as a cost benefit analysis, entitled "Smart Cities; How 5G Can Help Municipalities Become Vibrant Smart Cities" ("Accenture Study"), which claims that 5G could impact up to $275 billion in investment, create 3 million jobs and increase GDP growth by 500 billion dollars. Such a claim would be misleading at best. *See* ECONorthwest Reply Report, Ex. 3, p. 4 where Dr. Kevin Cahill provides a detailed economic criticism of the Accenture Study in his comments. It is not a cost-benefit analysis that justifies imposition of any additional rules.

[14] "Report and Declaration of Andrew Afflerbach For the Smart Communities Siting Coalition" (referred to herein as the "CTC Declaration"). The CTC Declaration is attached as Exhibit 1; "Definitions of Small Cells, and the Review of Small Cell Applications, Supplemental Report" (referred to herein as the "CTC Reply Report"). The CTC Reply Report is attached as Exhibit 1A; "Report and Declaration of David E Burgoyne for the Smart Communities Siting Coalition"(referred to herein as the "Burgoyne Declaration"). The Burgoyne Declaration is attached as Exhibit 3;"Report and Declaration of Steven M. Puuri for the Smart Communities Siting Coalition" (referred to herein as the "Puuri Declaration"). The Puuri Declaration is attached as Exhibit 4.

[15] CTC Declaration and CTC Reply Report.

[16] *Id*.

[17] "The Economics of Government Right of Way Fees" (referred to herein as the "ECONorthwest Declaration"). The ECONorthwest Declaration contains an economic analysis of the effect of limiting the amounts that may be charged for use of the public rights-of-way and concludes that the rulings sought by Mobilitie will not promote economically efficient deployment of public rights-of-way and will discourage innovation. The ECONorthwest Declaration is attached as Exhibit 2. "Reply Declaration of Kevin E. Cahill, PhD, Regarding the Accenture Report and the Economics of Local Government Right of Way Fees" (referred to herein as the "ECONorthwest Reply Report"). The ECONorthwest Reply Report is attached as Exhibit 2A.

[18] ECONorthwest Declaration and ECONorthwest Reply Report.

As members of this coalition documented in their Mobilitie Docket Smart Communities Reply Comments,[19] the record revealed:

- That there are very few verifiable examples of deployment problems caused by municipalities that are not fully addressed by existing rules;
- That in some cases, communities cited as "problems" by some providers were lauded by others in the industry as speeding deployment, suggesting that some complaints have more to do with individual business preferences than barriers to entry (and also suggesting that preempting local efforts may actually undermine procedures that are working to speed deployment);
- That there is strong evidence that deployment of wireless broadband infrastructure is proceeding apace; and
- To the extent that there are delays, the large majority of deployment delays were attributable to incomplete applications – a problem some localities are seeking to address through pre-application meetings.

1. *The Mobilitie Docket Contained a Paucity of Specific, Verifiable Allegations Backing Industry Complaints.*

Commenters and reply commenters in the *Mobilitie* docket were not able to provide many specific examples of municipal or state behavior that are not already fully and adequately addressed by existing rules. Industry complaints of problems routinely lack specific and verifiable information, which prompted the Commission in this NPRM to "strongly urge" commenters who make complaints "to identify the particular entities that they assert engaged in such conduct or practices."[20]

Crown Castle was the primary industry commenter that actually named communities and local government practices that it felt establish a predicate for action in the Mobilitie proceeding. But a review of Crown's comments reveals that despite the fact that the company states it is "the

[19] Mobilitie Docket Smart Communities Reply Comments. *See* also Part III.B.1-6 *infra*.

[20] NPRM ¶ 6, FN 9.

nation's largest provider of shared wireless infrastructure"[21] it could only muster about 25 communities that it claims have rules and practices that Crown finds offensive.[22] And even those claims should not be taken at face value but should be evaluated after hearing from the communities themselves.[23] Notably, some of the communities that Crown maligned are held up as model communities by other providers. (*See, e.g.* Smart Communities member Atlanta, Georgia).

But were every complaint made by Crown true, still the number of verifiable complaints is small. According to the 2012 Census of Governments, there are over 90,056 local governments in the United States.[24] Twenty-five complaints against that number represents 0.02%. If we measure the number of complaints against the 38,910 general purpose units of government, the percentage of complaints rises to a paltry 0.06%. This hardly presents a case for revising existing regulations to further limit local and state authority (even assuming the Commission had authority to adopt rules that addressed issues discussed in the NPRM).

As the Virginia Department of Transportation stated: "There has been no demonstration of a nation-wide problem that warrants a "one size fits all" solution as Mobilitie, LLC requests in its Petition for Declaratory Ruling."[25] The same conclusion holds here. There is certainly no reason to assume that the costs associated with preemptive action would justify the actions

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[21] http://www.crowncastle.com/about-us.aspx .

[22] *See e.g.*, Comments of Crown Castle in the Mobilitie docket (filed Mar. 8, 2017) ("Mobilitie Docket Crown Castle Comments"). Among industry commenters naming allegedly offending communities, the Comments of Conterra Broadband in the Mobilitie docket (filed Mar. 8, 2017) ("Mobilitie Docket Conterra Broadband Comments") contains complaints against the City of Baltimore, MD and Newark, NJ, not because of their wireless siting rules, but because of "Dig Once" principles endorsed by the Commission and a linear foot charge Newark seeks to impose for access to the public rights-of-way.

[23] For example, the City of Redwood City, California responded to the complaint about its so-called ban on wireless in the public rights-of-way. (*See* Reply Comments of the City of Redwood City, California in the Mobilitie docket.)

[24] 2012 Census of Governments available at https://www2.census.gov/govs/cog/g12_org.pdf.

[25] Comments of the Virginia Department of Transportation in the Mobilitie Docket, p.1 (Mar. 8, 2017) ("Mobilitie Docket VA DOT Comments").

requested (because no cost-benefit analysis has been provided by the industry, and no cost-benefit analysis is even requested by the Commission in this docket).

2. *The Mobilitie Docket Record Shows Deployment Has Proceeded Apace.*

Industry's comments in response to the *Mobilitie* Petition demonstrate there have been very few cases that turn on a failure of a community to act in a timely way. Industry did not show that a shorter time frame is required, or would significantly cut deployment times, given, for example the time required prior to beginning construction for things such as make-ready engineering work.

One community accused of delays by name in industry comments in the Mobilitie docket was Montgomery County, Maryland.[26] Montgomery County is a member of this coalition , but also filed Supplemental Comments in the Mobilitie docket[27] in which the County documented that any claims of delay or excessive fees made against the County are dwarfed by its record of success, including:

- The County has reviewed 2,900 applications in 20 years, and currently has 1,121 wireless facilities deployed at 534 unique locations throughout the County.
- …The County Department of Permitting Services processes over 60,000 permits and conducts more than 157,000 inspections annually.[28]

The record in the Mobilitie docket also suggests that in cases where the time between initial application and grant of the request has been longer than one might expect under the Commission's shot clock rules, the fault lies with the operator, Mobilitie being a particular complainant and culprit in this regard. The Mobilitie Docket Montgomery County Comments

[26] *See e.g.,* Mobilitie Docket Crown Castle Comments at pp. 12-13 (burdensome application fees) and perhaps is the "Maryland locality" complained of at p. 15 of the Comments of Mobilitie in the Mobilitie docket ("Mobilitie Docket Mobilitie Comments") as being "on hold" for eleven months.

[27] Supplemental Comments of Montgomery County, MD in the Mobilitie Docket (filed Mar. 8, 2017) ("Mobilitie Docket Montgomery County Comments").

[28] Mobilitie Docket Montgomery County Comments at p. i.

offered the Commission a detailed timeline documenting its own experience with Mobilitie, and explained that the company repeatedly submitted incomplete applications, and abandoned its original plans for different ones. Similarly, the record showed that in some cases entities do not get necessary franchises or licenses, because they refuse to apply for them based on a misreading or misunderstanding of state law requirements.[29] The resulting "delays" from choices made by the companies themselves are of course not justification for preemption.

3. *Cities Are Praised in Industry Comments in the Mobilitie Docket.*

The real status of deployment — a result of cooperation among states, localities and wireless providers — allowed Chairman Pai to boast that the U.S. is the world's leader in deployment of 4-G technology.[30] It is hard to square that level of success with the "barriers" the NPRM implies exist. It is also hard to reconcile this collective achievement with Mobilitie's CEO Gary Jabara's view that a consultative process is a reflection of "…how stupid the elected officials — the mayor and the city councilors — are."[31] Or that "[t]here are many stupid cities around the country — really dumb. They're greedy. They have their hands out."[32]

Notably, the industry is not uniform in its distress call. The record in the Mobilitie docket reveals that there is praise for some U.S. cities as models for the world. For instance,

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[29] *See* Mobilitie Docket Montgomery County Comments at pp. 12-20. ("A 10 Month Odyssey And Counting: Mobilitie Has Not Put Forth A Reasonable Effort To Use The County's Telecommunications Siting Process").

[30] Smart Communities celebrates that our efforts permit Chairman Pai in a February 28, 2017 keynote address to the Mobile World Congress that "....98% of Americans now have access to three or more facilities-based [wireless] providers. And the United States has led the world in the deployment of 4G LTE." Those successes are local governments' as much as they are the industry's. Address available at https://www.fcc.gov/document/chairman-pais-keynote-mobile-world-congress-barcelona.

[31] Don Bishop, *Seeing Wireless Service as Essential Speaks to the Future of Wireless Infrastructure*, AGL Magazine (March 2017) at p. 38 available at http://cdn.coverstand.com/39675/389411/213ff655b3e370bf9735aed1e62d36199b03bc91.3.pdf ("Jabara Interview"). It should be pointed out that a number of Smart Communities members are cited in the AGL interview as being the best of the best of communities.

[32] Jabara Interview at p. 38.

Nokia[33] shares with the Commission an international study of best practices from 22 international cities. The study features Cleveland, New York City and San Francisco. In a chart to accompany the report, all three U.S. cities scored relatively high compared to the other cities studied on smart, safe, and sustainable measures. Further, the study reveals that New York City and San Francisco are global models or "advanced smart cities." Cleveland, while characterized as being behind a number of other cities in the study, is nevertheless identified as one to be watched as the city features a number of ambitious pilot projects.[34]

Crown Castle highlighted a number of communities for their model conduct including: Cincinnati, Ohio, Chicago, Ill., Pittsburgh, Pa., Minneapolis, Minn., Louisville-Jefferson County Metro Government, Kentucky, State College, Pennsylvania, Brookfield, Wisconsin, Little Elm, Texas, The Colony, Texas, Texas City, Texas, New York City, NY, Philadelphia, PA., and the Borough of Sea Bright, New Jersey.[35]

So not only were the number of named communities complained about in the Mobilitie docket small, there are almost an equal number of communities that industry commenters praise and recommend to others that they serve as models to be followed, or best practices to be emulated in this developing market. The Mobilitie docket's record not only shows that the claims of "barriers" are not founded, it also demonstrates that localities are able to craft creative solutions that allow rapid deployment within the public rights-of-way once basic design parameters are established. The City of New York, for example, has developed standards for

[33] Comments of Nokia in the Mobilitie docket (filed Mar. 8, 2017) ("Mobilitie Docket Nokia Comments").

[34] Mobilitie Docket Nokia Comments.

[35] Mobilitie Docket Crown Castle Comments at pp. i-ii, 5 and 8.

placement of facilities on its proprietary property that are designed to ensure that small cells visible in the public rights-of-way remain small (with equipment cabinets under 3 cu. ft).[36]

4. *Industry Players Sometimes Have Inconsistent Views Of the Same Communities in the Mobilitie Docket.*

One revealing feature of the industry comments in the Mobilitie docket, and a reflection of the challenges facing local governments as they seek to meet the needs of the community and industry, are the inconsistent views of a given community in the industry comments.

Chicago,[37] San Francisco,[38] and New York City[39] were simultaneously praised as models by some commenters (*See, e.g.* Nokia, Sprint and Crown) and criticized by others such as the Competitive Carriers Association "for demanding unreasonable annual and escalating pole attachment fees."[40] Smart Communities member Atlanta, Georgia was praised by Mobilitie as a model city for deploying small cell wireless technology,[41] while Crown Castle would list Atlanta in the bad actor category for an overly expensive fee ordinance that it has yet to pass.[42] Crown

[36] The New York City DoITT standards appear as appendices to the eight mobile franchises issued by the City, which can be found at https://www1.nyc.gov/site/doitt/business/mobile-telecom-franchises.page

[37] Mobilitie Docket Crown Castle Comments at p. i-ii.

[38] San Francisco finds itself praised by Nokia as a model for other cities of the world, but criticized by Crown Castle (Mobilitie Docket Crown Castle Comments at p. 15) and T-Mobile (Comments of T-Mobile in the Mobilitie docket (filed Mar. 8, 2017) ("Mobilitie Docket T-Mobile Comments") at pp. 2-3) and being regulatory over bearing.

[39] Comments of Sprint in the Mobilitie docket at p. 18 (filed Mar. 8, 2017) ("Mobilitie Docket Sprint Comments") describes New York City as responding to the needs of its residence by adopting a streamlined application process.

[40] Comments of Competitive Carriers Association in the Mobilitie docket at p. 17 (filed Mar. 8, 2017) ("Mobilitie Docket CCA Comments"). *See* also Mobilitie Docket T-Mobile Comments at pp. 2-3 which criticizes San Francisco for adopting "…an ordinance that singles out wireless facilities in public ROWs for discretionary pre-deployment 'aesthetic' review not imposed on similarly-sized landline or utility facilities."

[41] Don Bishop, *Seeing Wireless Service as Essential Speaks to the Future of Wireless Infrastructure*, AGL Magazine (March 2017) at p. 36 available at http://cdn.coverstand.com/39675/389411/213ff655b3e370bf9735aed1e62d36199b03bc91.3.pdf ("Jabara Interview").

[42] Mobilitie Docket Crown Castle Comments at p.12 – The City of Atlanta files as part of the Mobilitie Docket Smart Communities Reply Comments as Exhibit 1 a Letter from William Johnson, City of Atlanta, dated April 5, 2017 to Chairman Pai and Commissioners Clyburn and O'Rielly ("Atlanta Letter") that provides a different story. ("The City of Atlanta, specifically the City's Utilities Committee, is considering an ordinance that would establish reasonable fees for wireless pole attachments in the City's public right-of-way. Before moving the legislative proposal out of Committee, the City invited the Georgia Wireless Association ("GWA") to engage in discussions

Castle criticized communities for *even considering* ordinances identical to ordinance adopted by San Diego.[43] Yet, CTIA's Accenture Study holds San Diego out to the world as a model for integrating smart technology into its Smart Lighting initiative, which includes wireless service.[44]

5. *Communities Want and Support Wireless Infrastructure in Their Planning and are Changing Processes to Accommodate Need and Increased Demands.*

As Commissioner O'Rielly recognized recently, communities see the benefits of wireless connectivity and have been working to accommodate the need and increased demands of the wireless industry, while protecting important community values.[45] Comments filed in the Mobilitie docket by a diversity of communities reflected this fact – and all showed that wireless deployment is proceeding apace.

CTC Technology & Energy ("CTC") is an independent communications and IT engineering consulting firm with more than 30 years of experience with public sector and non-profit clients throughout the nation. A leading example of their work can be seen in the Washington, D.C. area's regional wired and wireless communications interoperability initiative funded by the U.S. Department of Homeland Security.

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about the proposed ordinance. As a GWA member, Crown Castle has participated in three meetings at City Hall during a five week period, with a fourth meeting scheduled to occur in two weeks. The meetings were hosted by City officials from the Mayor's Office and the Department of Public Works, and attended by approximately 20 industry representatives from GWA. In response to industry's input, including that of Crown Castle, during the first three meetings, the City substantially restructured the proposed ordinance. None of this information, however, was included in Crown Castle's description of the City's ordinance that was shared with the Commission.")

[43] Mobilitie Docket Crown Castle Comments at p. 20. "For example, the cities of Vista, California, and Palos Verdes Estates, California, are considering draft ordinances (virtually identical to ordinances adopted in Irvine, Santa Monica and San Diego) governing the review process for wireless facilities that include an 'amortization' provision effectively prohibiting the grant of new EFR permits for an existing facility."

[44] CTIA *Ex Parte* Letter to Marlene Dortch in the Mobilitie docket (filed Jan. 13, 2017), Accenture Study at p. 7.

[45] On the day that Comments were filed in the Mobilitie docket, Commissioner O'Rielly updated the Senate Commerce Committee on the status of wireless broadband infrastructure deployment. He reflected that "…the vast number of communities see the benefit of broadband deployment and welcome providers seeking to serve their citizens…Oversight Of The Federal Communications Commission," Testimony of Commissioner Michael O'Rielly before the Senate Commerce Committee (March 8, 2017) http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0308/DOC-343816A1.pdf.

In his Declaration[46] included in Smart Communities' opening Comments in the Mobilitie docket, CTC's Afflerbach explained, many communities are working with industry to develop new approaches to deployment that take wireless into account as part of the development processes associated with new subdivisions, roadway widening, or as part of a general planning processes that is designed to provide some certainty for both localities and for providers as to what may be installed, and where.[47] This process may take some up front time, and is distinct from the procedures that apply once an application is received under Section 332(c)(7) or Section 6409.

This preliminary planning work may appear to result in a delay in deployment, as communities gather all industry players together to attempt to develop a cooperative solution. But the "upfront" time may translate into faster consideration of individual applications over the longer term, as providers and communities alike, gain a better understanding of what is required of them, and providers submit applications that are tailored to community requirements. These local consultative processes ought to be encouraged, and certainly provide no basis for additional federal regulations.

Smart Communities are committed to developing processes that encourage deployment of advanced wireline and wireless systems. Not only do we understand that our citizens increasingly depend on access to broadband; the efficient operation of our communities and the future economic health of our communities also depend on taking advantage of the opportunities presented by new wireline and wireless technologies. While different communities will take advantage of these technologies at different paces, local governments, road agencies and special districts recognize the powerful opportunities the IoT and wireless technologies present for

[46] Mobilitie Docket Smart Communities Comments, Ex. 1, CTC Declaration.

[47] Mobilitie Docket Smart Communities Comments, Ex. 1, CTC Declaration, at pp. 23-25.

delivering public services more efficiently, improving public health and safety, and attracting new businesses. We are watching and adopting technologies that will permit us to, among other things, reduce energy consumption while improving street light efficiency; read meters wirelessly; identify and respond to problems with sewer and water lines; and provide more efficient public transit. The City of Los Angeles, for example, was the first city in the world to deploy Philips/Ericsson SmartPole technologies, which turn street lights into hubs for existing and future wireless technologies.[48]

Similarly, the City of Yuma, Arizona is in advanced talks with Siemens Industries and anyCOMM to undertake a LED streetlight conversion project that would not only convert streetlights to more energy efficient fixtures, but also incorporate wireless sensor devices atop the streetlights that would be capable of providing next generation wireless as well as WiFi internet access throughout the City, and other smart city applications. The City is leveraging its ownership of street light poles and an extensive fiber network to facilitate the project, and anyCOMM would be bringing "$10 million worth of investments to Yuma, including a network operations center and 300-high paying jobs."[49]

We do not believe the IoT depends on the authorization of the towers Mobilitie and others seek to deploy (the CTC Declaration submitted in the Mobilitie docket, and attached here,[50] along with our own experiences, explains why it does not). Nor do we believe that regulating placement of wireless facilities or charging for use of the public rights-of-way or other public property such as water towers or street lights, is inconsistent with effective and efficient

[48] For more information see https://www.ericsson.com/networks/cases/networks-cases/philips-smartpole-with-ericsson (last accessed 3/7/2017).

[49] For more information see http://www.yumasun.com/news/company-s-plan-may-bring-jobs-to-yuma-software-sensors/article_254e0fe8-4e26-11e7-9e8c-dffb779ef76d.html

[50] CTC Declaration at p. 15.

deployment of wireless technologies. As the expert reports attached hereto explain, given the potential safety issues associated with public right-of-way deployment; the potential negative impacts on property values; and, the predictable negative economic effects that would flow from further cost and fee regulation, local review and local charges actually *encourage* efficient deployment of advanced wireless technologies.

6. *The Mobilitie Docket Showed Delays in Deployment are Most Often Attributable to Incomplete Applications.*

The NPRM here, much like the Notice in the Mobilitie docket cites to delays and potential delays in siting 5G technology as its predicate for action. Industry commenters in the Mobilitie docket, however, fail to prove that claimed delays are occurring, and more importantly, the record in Mobilitie docket reveals that the large majority of delays are attributable to incomplete applications.[51]

The NPRM asks whether there are "ways in which applicants are causing or contributing to unnecessary delay in the processing of their siting applications? For example, to what extent have delays been the result of incomplete applications or failures to properly respond to requests to the applicant for additional information."[52] As members of this coalition showed in the Mobilitie docket, incomplete applications continue to be a major problem.

[51] The only time any Mobilitie docket industry commenter approached the presentation of any data of delay was Sprint which stated: "Mobilitie has sought access agreements in hundreds of jurisdictions. Of those, 343 have taken more than six months to reach agreement. Of those 343 jurisdictions, 75 have taken more than a year, 11 have taken more than 18 months, and two have taken more than two years." (Sprint Comments at p. 22) Sprint does not tell us how many were granted in less than 6 months, nor the reason for any delays, i.e., how many of these were the fault of Mobilitie, and the poor engineering that we and other local government commenters demonstrated was endemic in Mobilitie applications. For instance, as to any pending applications in Montgomery County, the County's Mobilitie docket filing documents the 10 month struggle it has engaged in with Mobilitie and its ever changing staff to develop a complete application. In addition, a number of the applications submitted by Mobilitie to Montgomery County were for locations that were in municipalities and not even subject to the County approval process. (*See* Mobilitie Docket Montgomery County Comments at pp. 12-20)

[52] NPRM ¶ 7.

Once an application is received, it must then be reviewed before it can be approved. As the CTC Declaration explains, to the extent that there are "delays," most delays in processing an application are caused by incomplete applications.[53]

As discussed in Smart Communities' filings in the Mobilitie docket, Mobilitie unfortunately provides the paradigmatic example of an entity that causes its own delays – and in the course of doing so, increases the costs of regulatory review. While Mobilitie has actually deployed facilities in some of the Smart Communities, and is entering into agreements to do so in others, its record in many communities is not pretty.

(i) *Mobilitie submitted applications before it had legal authority to operate, or containing false claims regarding Mobilitie's legal authority.*

In early 2016, several subsidiaries of Mobilitie began submitting applications to place towers in the public rights-of-way in communities across the country. The applications were essentially cookie cutter applications, and were submitted initially with letters claiming that the subsidiary was certificated by the state public service commission and had the right to use the public rights-of-way. In many cases, however, the subsidiary was not even licensed to do business in the state, and had not filed an application with the public service commission at all. An example involving Centerville, Georgia is attached in Exhibit 6.[54]

[53] CTC Declaration at p. 20.

[54] The proposal is for a 120' tower on a narrow street; it is not clear the structure could even be placed at the location proposed without blocking the sidewalk. In early 2016 in Georgia, applications were received from either Network Utility Technologies of Georgia, LLC or Interstate Transport and Broadband, LLC. Neither of these companies had a GPSC certificate; Mobilitie did, but it did not even file to transfer that certificate to its subsidiaries until after filing applications with localities. Other names under which Mobilitie sought applications included names which appeared to be designed to convince localities that it was a functionary of the state:

Alaska Utility Pole Authority
Arizona Utility Pole Authority
Arkansas Utility Pole Authority
Florida Utility Pole Authority
Illinois Utility Pole Authority
Indiana Utility Pole Authority
Minnesota Utility Pole Authority

In cases where it *was* licensed to operate, Mobilitie made false claims about its rights to enter onto municipal property. For example, on December 20, 2016, the Michigan Public Service Commission ruled and granted the applications requested in two cases, U-18067 (Mobilitie Management LLC's application to provide basic local exchange services) and U-18125 (Utility Network Authority MI, LLC's application to provide basic local exchange services), but had to remind the applicants that a license to provide basic local exchange service does not constitute authority for providing other services, such as DAS networks, and does not circumvent the requirement to obtain the necessary permits from municipalities to access their public rights-of-way.[55] Nonetheless, applications submitted to localities claimed the MPSC license authorized right of way entry.

In these situations, localities must spend time and effort notifying Mobilitie that it should have authorizations to operate in a state, or it must obtain required consents. And in addition – even though the application is not remotely valid, the locality must detail other problems in the application, even where it is not clear the company will be in a position to pursue deployment.

Mobilitie submitted applications that omitted obviously required information, and that involved almost no field engineering. As a result, localities had to devote resources to reviewing

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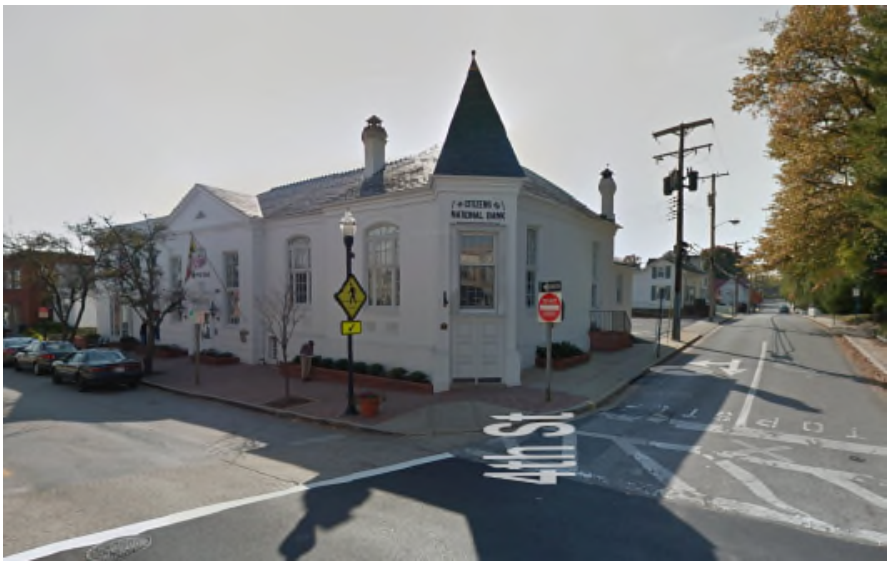
Missouri Utility Pole Authority
North Dakota Utility Pole Authority
Ohio Utility Pole Authority
Oregon Utility Pole Authority
Pennsylvania Utility Pole Authority
Rhode Island Utility Pole Authority
Vermont Utility Pole Authority
West Virginia Utility Pole Authority
Wisconsin Utility Pole Authority
Wyoming Utility Pole Authority

Even where it had obtained authority, Mobilitie caused delay and confusion by falsely claiming it had obtained rights to use rights of way in communities when it clearly had not.

[55]The Orders are available at: http://efile.mpsc.state.mi.us/efile/docs/18067/0026.pdf and http://efile.mpsc.state.mi.us/efile/docs/18125/0019.pdf, respectively.

proposals that had, among other things obvious safety issues, were inconsistent with the ADA (blocking handicapped access), and involved placement of new 120 foot towers in historical districts or in front of historical structures. The Centerville responses in Exhibit 6 provide a good example of the problems with the sort of applications received from Mobilitie. While facilities are proposed to be placed in the public right-of-way, the drawings submitted do not show detailed foundation or pole depth specifications – facts obviously critical to public right-of-way safety.

In many cases facilities are proposed at locations that are plainly not viable locations. In Laurel, Maryland, for example, Mobilitie proposed to install a 75-foot tower in the Laurel Historic District, in front of the Citizen's Bank, in a 6'9" brick sidewalk near a handicapped access ramp. The proposal required the tower to be embedded 11' underground, even though underground utilities including electrical utilities are at that location. The proposal was submitted without any structural work or surveying to determine whether it could be safely installed as proposed.



Laurel Historic District

The Laurel application is attached as Exhibit 7. Laurel was required to spend staff time and effort to review an application that should never have been submitted for the location proposed. As detailed in the Smart Communities filing in the Mobilitie docket, other communities have faced similar problems.[56]

(ii) *Application deficiencies are often followed by silence.*

Application deficiencies are often followed by extended silence. This was true, for example, with Monroe, Michigan, De Soto County, Mississippi, Frederick, Maryland, and numerous other local governments. Where there have been continued contacts, the siting process may involve what is effectively an entirely different proposal. For example, in Cary, North Carolina, Mobilitie originally submitted five "applications" in 2016 for 120' towers in the public right-of-way. Following correspondence addressing the incompleteness of the application, Mobilitie and Town staff met in October of 2016 and again in February of 2017. While formal applications have not been filed, Mobilitie has indicated they now have plans for about twenty sites in the Town at elevations far less than 120 feet.

(iii) *Mobilitie and others often do not accurately identify the location of proposed facilities.*

The applications submitted by Mobilitie typically included a set of plans that might (but often do not) accurately identify the location of the proposed deployment. In many cases, the location sought for the tower was not within the jurisdiction of the government entity receiving the application.[57]

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[56] *See* Mobilitie Docket Smart Communities Comments and Mobilitie Docket Smart Communities Reply Comments.

[57] Sugar Land, Texas received requests for eight sites, of which seven were located on state rights-of-way. Consent to use the rights-of-way is required prior to approval from a state agency, the Texas Department of Transportation, in addition to compliance with City requirements, requiring detailed coordination between both jurisdictions on current and proposed road construction work in the area. Another example may be found in DeKalb County, Georgia where more than half of the requested sites were in Georgia rights-of-way. Still DeKalb and Mobilitie are

(iv) *The deficiencies in the applications suggest the company made almost no real effort to comply with local requirements.*

In many cases, no application fee accompanied these applications, but there was always a request for a community contact. The same application packet (or a virtually identical packet) was received across the country, regardless of local forms or any requirement that the forms be filed electronically. In many cases, communities received multiple applications, all of them incomplete.[58]

Worse, in some cases Mobilitie built its facility without going through required federal, state or local requirements. Mobilitie installed a pole without going through this Commission's Section 106 process in a historic district in Denison, Texas, and then removed it (*see* Texas Municipal League's Comments for additional detail on Mobilitie in Denison, Texas and Section 106 issues). In Baltimore, Maryland, Mobilitie was required to remove a pole it placed in a sidewalk ramp that made the sidewalk non-ADA compliant. The cost of remediating these problems falls on local and state governments, and not just on Mobilitie, especially when important laws like the ADA are involved. And those costs incurred by local communities must be recoverable in full.

Smart Communities were not the only communities to report problems with Mobilitie and other providers. For instance, numerous parties commented in the Mobilitie docket that as a routine matter, the company submitted cookie cutter proposals for 100-120 foot towers in the

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close to reaching a Master License Agreement on different terms from the Georgia Municipal Association Mobilitie agreement.

[58] In Montgomery County, MD, Mobilitie filed hundreds of applications in a single day; not one was complete. The separate comments of Montgomery County provide the detailed timeline — it took eight months before even a single complete test application was submitted. Los Angeles reports requests for 1,900 locations. In Boston, Mobilitie identified 219 locations for DAS/Small Cell installations, 204 of these on City Poles and 15 on Eversource/Verizon Poles. The City sent Mobilitie a DAS/Small Cell agreement and a Dark Fiber agreement on February 3rd for execution.

public rights-of-way, without doing any meaningful field engineering,[59] or making any significant effort to comply with state, federal or local requirements. Mobilitie CEO Gary Jabara may have explained exactly why so many Mobilitie applications looks the same, and repeat the same deficiencies. "At Mobilitie, we've done a good job of industrializing the process. We take 20 seconds to pop out a set of drawings based on algorithms and form factors."[60] Community needs and safety considerations are not typically found in algorithms and form factors that can be addressed in 20 seconds.

The impact of these "20 second applications" on local governments is extended hours of work for local government reviewers. Most often these reviews result in the application being returned as incomplete with a detailed incompletion notice, and a shifting of significant costs, both opportunity and real, not only to communities such as Smart Communities and other local government commenters,[61] but also to other wireless applicants. This latter cost shift is as a result of the time and resources that might otherwise be available to process that applicant's submission being consumed to address Mobilitie's "20 second applications."

Despite the problems identified above, local governments do continue to work with Mobilitie. The key point is that behavior like Mobilitie's adds significantly to the cost, burden and time required to process small cell applications; localities are being asked to do work Mobilitie itself should have performed. And Mobilitie, while the worst offender, is by no means

[59] Comments of Michigan Road Commission (filed by Denise S. Donohue) in the Mobilitie docket at p. 1 (filed Mar. 9, 2017) ("Mobilitie Docket Michigan Road Commission Comments"). While Michigan's local county road agencies and others recognize the importance of expanding wireless infrastructure, it is significant to note that nowhere in Mobilitie's pending Petition for a Declaratory Ruling is safety either mentioned or addressed. *See e.g.* Mobilitie Docket Montgomery County Comments; Comments of Houston, TX in the Mobilitie docket (filed Mar. 8, 2017) ("Mobilitie Docket Houston Comments"); New York Comments in the Mobilitie docket (filed Mar. 8, 2017) ("Mobilitie Docket New York Comments"); Comments of Edina, Minn. in the Mobilitie docket (filed Mar. 5, 2017) ("Mobilitie Docket Edina Comments") (City established a Master License Agreement to meet needs for deployment).

[60] Jabara Interview at p. 42.

[61] Jabara Interview at p. 42.

the only applicant that causes excessive delays. The collective comments of local governments,[62] road commissions and state highway officials,[63] as well as technical experts[64] in the Mobilitie docket are clear: where there appear to be problems with the speed of deployment of wireless facilities, they are most often the result of some shortcoming of an applicant that failed to file a complete application or in the alternative fails to acknowledge and address the safety concerns raised by deploying infrastructure within the public rights-of-way.

II. RATHER THAN IMPOSE NEW NATIONAL RULES MICROMANAGING LOCAL PROCESSES, THE COMMISSION SHOULD PROMOTE COOPERATIVE EFFORTS .

Smart Communities are disappointed and somewhat perplexed that the NPRM seeks comment on new rules with no reference to existing initiatives – and without any specific rules on which to comment.

A. The Existing Rules Require No Supplement: Public-Private Cooperation Is Working at the Local Level.

The NPRM asks commenters to "detail the extent to which the Commission's existing rules and policies have or have not been successful in addressing local siting review challenges, including effects or developments since the 2014 Infrastructure Order, the Commission's most recent major decision addressing these issues."[65]

The implicit assumption is one with which we do not agree – namely, that the rules were needed to address local siting review challenges. Setting that aside, the rules did establish a

[62] *See e.g.,* Mobilitie Docket Smart Communities Comments at p. 8 ("The Cities note their experience with incomplete or otherwise deficient applications slowing down (or preventing) deployment….These delays have impacted the City's development and finalization of master lease agreements with providers for use of ROW and City-owned poles for small cell/DAS installations.")

[63] Virginia DOT Comments in the Mobilitie docket (filed Mar. 8, 2017) ("Mobilitie Docket VDOT Comments") at p. 7; *See e.g.,* American Association of State Highway and Transportation Officials Comments in the Mobilitie docket (filed Mar. 21, 2017) ("Mobilitie Docket AASHTO Comments").

[64] *See e.g.,* Mobilitie Docket Smart Communities Comments, Ex. 1, CTC Declaration at p. 20. (Most delays in processing an application are caused by incomplete applications.)

[65] NPRM ¶ 6.

deadline by which localities must act, or be presumed to be in violation of Commission rules. Litigation must be filed within 30 days of a failure to act. Based on the case law, there are *not* many instances where a locality has been found to have violated the presumptive timelines established by the Commission, or where a deadline violation is alleged. As explained in the Mobilitie docket, the current deadlines, because presumptive, have permitted localities and providers to address issues like the proper handling of bulk applications without the need for litigation or guidance from the Commission.

Smart Communities members have already met significant requests from numerous wireless providers and DAS companies for access to public rights-of-way, in addition to those discussed *supra*. Boston has approved nearly 400 DAS/small cell installations in the public rights-of-way with three neutral host companies.[66] Atlanta has approved 257 applications[67] and Houston has approved over 350 locations.[68] Demand is not expected to slow down. Houston, for example, believes that they will received requests for as many as 800 additional locations in the not so distant future.[69] But it is not just the larger communities that are being challenged to meet demands for public rights-of-way access. Ann Arbor, Michigan, in just the last two years has dealt with more than 70 applications for small cell facilities.[70] Other communities are also

[66] Boston has agreements with Crown Castle, ExteNet and American Tower that provide that two-thirds of the installations will take place on City-owned Streetlights or traffic lights and the remainder on jointly-owned (Eversource-Verizon) poles. The majority of these installations have been in place for about eight years, but recent interest and engagement by carriers, as well as additional neutral hosts, indicate that number could treble in the next 2 years and again in 4 years.

[67] These approvals break down as 174 for Crown Castle and 83 for Mobilitie. Atlanta reports that Mobilitie has indicated a request for more than 200 sites within the city.

[68] Houston explains that in addition to the 350 locations already approved, they are anticipating as many as 800 more requests as Zayo, Crown Castle, Verizon, and Mobilitie each have expressed a desire to build out an entire network, which could be as many as 200 locations for each company.

[69] The City of Los Angeles reports that is has approved nearly 100 Mobilitie sites alone.

[70] Between 2015 and 2016, ACD.net filed applications for 29 locations with Ann Arbor, only to withdraw each of those applications and submit 18 new applications in late 2016 and early 2017. One day, when an individual at ACD.net tried resubmitting its applications with the required detailed drawings for each location and got a bounce

meeting these requests. For example, Verizon is deploying 400 small cells in San Francisco[71] and planning more than 100 in Sacramento as a 5G "showcase city" to sell the concept in other markets.[72]

The marketplace is working. The Commission at most should be identifying successes and encouraging additional cooperation. The Commission should not create disincentives to creative public-private solutions, as many of its rules would necessarily do. By complicating the deadline structure, or otherwise seeking to parse rules into smaller and smaller parts to address all the possible permutations of the wireless industry deployments, the Commission will add to the complications associated with local rules, regulations, processes and forms. The burden on smaller communities will be enormous, and will likely require special personnel who will need to be paid for by the industry.

As the CTC Declaration explains, deployment is most efficient when localities work with service and facilities providers to develop solutions for the problems presented by small cell deployment and particularly, small cell deployment in the public rights-of-way.[73] Additional rules will at best complicate existing powers and at worst will discourage cooperative approaches.[74]

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because of the email and attachment size, the individual at ACD.net resubmitted the same email and drawings two more times, crashing the Ann Arbor engineer's mailbox, and causing the engineer's computer to be down for all purposes for approximately six hours.

[71] http://www.fiercewireless.com/wireless/verizon-to-deploy-400-small-cells-san-francisco

[72] http://www.sacbee.com/news/local/article153716914.html

[73] CTC Declaration at pp. 22-23.

[74] As we have pointed out in this filing, and as CTC explains, the Commission's 6409 rules are often a barrier to solutions in sensitive areas like residential areas because they permit small installations to grow in a manner that will be significant to residents. *See also* Burgoyne Declaration.

To the extent that the existing rules fail, it is because those rules prevent development of mutually agreeable solutions that allow deployment while protecting legitimate interests of the public and of communities.

1. *The Commission's 6409 rules interfere with resolution of siting issues, particularly in residential neighborhoods.*

Under Commission rules implementing Section 6409, with certain important exceptions, if a locality approves placement of a wireless facility in the public rights-of-way that has no concealment elements, that facility can grow at least ten feet in height; any number of six foot appurtenances can be added to the structure; and if any ground cabinet is authorized at a wireless facility, more can be added, even if (as is now being proposed) the wireless facilities are in someone's front yard. The Commission would have benefited from the advice of the Harvard Business Review,[75] or pitching great Bob Feller[76]: "More is not always better." Many local governments are struggling to evaluate the impacts of so-called small cell deployments within the public rights-of-way that can grow unchallenged by such mass. The Commission needs to recognize this, and also address the fact that its rules implementing Section 6409 undermine the premise that deployment of small cell wireless infrastructure in public rights-of-way will be unobtrusive and insignificant. As the Burgoyne Declaration originally submitted in the Mobilitie docket explains, there is no reason to believe that the impacts of the sort of large deployments allowed by Commission rules are inconsequential.[77]

[75] https://hbr.org/2006/06/more-isnt-always-better

[76] While not nearly as quoted as Yogi Berra, legendary Indian pitcher Bob Feller is credited with "The difference between relief pitching when I did it, and today is simple, there is too much of it. It's one of those cases *where more is not necessarily better."* (emphasis added) The Athlete's Way: Training Your Mind and Body to Experience the Joy of Exercise (Christopher Bergland, St. Martin's Griffin Publishing, 06/10/2008, Page 290).

[77] Burgoyne Declaration at pp. 9-10.

Particularly for residential areas, and for areas where all other utilities are underground, the Commission should recognize that a change from a truly small facility to one that is substantially more massive *is* significant. If local governments can allow small cells and yet keep them small, the initial approval process is simpler. One way for the Commission to address the matter is to recognize that in particular areas, any changes beyond a small percentage change in any component is significant, as is the addition of ground cabinets. Given the examples we now have of the size of some "small cells," this is actually critical to ensuring the Commission's rules comport with the statute. But it also is important for the Commission to interpret Section 6409 in a way that makes it possible for localities to create and enforce safe harbors for dense deployment of wireless facilities. As the CTC Declaration explains, many communities are working to create development processes that allow for more straightforward deployment of wireless facilities, but the viability of those processes depends on being able to enforce adopted design standards for an area.[78]

2. *New Shot Clock Rules Reward Incomplete Applications to the Detriment of Properly Filed Applications*

We have discussed problems with incomplete applications above. Smart Communities believe that some applicants are responding to the fact that the FCC rules reward an applicant that files an incomplete application.

Under the current rules, there is no penalty in time lost for an incomplete application, but there are rewards should the reviewing body miss their 30-day or subsequent 10-day shot clocks. In those cases, the period for review of the application cannot thereafter be tolled for incompleteness,[79] and even if the reviewing body does not miss the 30- or 10-day shot clock, an

[78] CTC Declaration at p. 23.

[79] 2014 Infrastructure Order ¶ 218.

application that is submitted for a 3rd time because of incompleteness could result in the reviewing agency having less than 12 days to review a 6409 application, 42 days to review a 332(c)(7) colocation application, or 102 days to review a new site request.

Moreover, the lost time due to reviewing the same incomplete applications over and over again is not just a loss to the reviewing body, it is also a loss to the service or infrastructure provider that files complete applications – both because the cost of review is increased overall by submission of incomplete applications, and because staff time that could be spent reviewing routine applications must be spent detailing all the flaws in an incomplete application. The Commission should be clear that localities can penalize repeated incomplete applications and applicants without violating the Act. The Commission should make it clear that its rules regarding incompleteness do not prevent a locality from simply rejecting an application and/or imposing upon the applicant a charge to recover the expenses incurred in addressing such omissions, and should allow localities to dismiss a dormant application after a period of time without a hearing or a written decision. And at the very least, it should do nothing to prevent localities from taking steps to prevent submission of incomplete applications, by permitting pre-application meetings that do not count against the shot clock (see discussion below).

3. *Section 6409 Rules Should Be Clarified to Ensure Public Safety in Public Rights-of-Way is Preserved*

Finally, the Commission should make it clear that among conditions enforceable against an applicant under its Section 6409 rules are not merely adopted safety codes, but also practices and guidelines for deployments that address issues as to which there may be guidelines, but no specific rules (because of the many variations among deployment situations). An example are

AASHTO guidelines for placement of structures along the rights of way, which are not codified, but are critical to road safety.[80]

4. *The Commission Should Address a Barrier to Public Acceptance of Widespread Small Cell Deployments – Outdated RF Emissions Standards.*

There is one topic which we continue to urge the Commission to address – that is, updating standards to address public concern about RF emissions. Smart Communities and other local governments routinely receive public comments expressing RF radiation concerns about wireless applications. As small cell deployments anticipate many more installations in public rights-of-way much closer to the public in many more locations, Smart Communities anticipate increased public awareness and concern. Smart Communities cannot act on that basis of RF concerns, but we also recognize that successful deployment requires adoption; and the public is reluctant to accept deployments that it knows, and the Commission knows, are tied to outdated standards.

More than four years ago (March 29, 2013), the Commission opened a proceeding to address changes in the RF emissions standards related to human exposure that received nearly a thousand comments totaling more than 20,000 pages but has yet to take action to complete its review of its RF emission rules and determine if any updates were necessary. In response to the Mobilitie Petition Notice's open invitation to list actions the Commission might take to assist the deployment of wireless broadband infrastructure, Montgomery County,[81] members of this coalition and no less than eight-five percent of the parties filing in this proceeding called on the Commission to finish its work on the 2013 RF NOI.

As Montgomery County shared in its comments in the Mobilitie docket:

[80] *See* Puuri Declaration and Mobilitie Docket AASHTO Comments.

[81] Mobilitie Docket Montgomery County Comments at p. 28.

> The Commission's failure to act on RF rulemakings is resulting in growing public concern and potential opposition to 5G deployments in residential neighborhoods. The Commission has exclusive jurisdiction to regulate RF emissions.[82]

Commission action is particularly important because there are recent studies describing the impact of small cell deployments on RF exposure that are simply not reflected in existing rules.[83] To put it another way: The basic predicate of this proceeding is that deployment of ultra-dense wireless networks is a public benefit. A further basic assumption is that such a deployment (which is designed to lead to greater use of wireless devices generally) does not endanger public health. Smart Communities believe it will be much easier to gain public acceptance and support for deployment of wireless facilities (which will in turn lead to more public and private properties being opened for placement) if the Commission acts to complete its 2013 RF proceeding. Indeed, it is arguably required to do so before preempting local authority any further.

B. The Commission Should Support Local Actions to Create Disincentives to Filing Incomplete Applications and to Terminate Inactive Applications

The Commission asks "what siting applicants can or should be required to do to help expedite or streamline the siting review process" and how Commission measures "ensure that applicants are responsible for supplying complete and accurate filings and information?"[84]

As suggested above, the Commission's own incompleteness rules add to costs that otherwise apply, and can add to the time required for review. Those rules have the perverse effect of adding to the processing time and costs for applications, and create an incentive for applicants to file incomplete applications. This incentive may be amplified by the relationship

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[82] Mobilitie Docket Montgomery County Comments at p. 28.

[83] http://onlinelibrary.wiley.com/doi/10.1002/bem.22045/full#references; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4377923/.

[84] NPRM ¶ 7.

between wireless service and facilities providers, which the Commission should investigate as part of this NPRM, should it wish to proceed further. If, for example, an infrastructure provider is paid on milestones (when an application is filed for example) there will be an additional financial incentive to file without doing the work required to prepare a complete application.

C. Pre-Application Processes Improve the Quality and Completeness of Applications; Existing Rules Discourage These Processes.

The Commission seeks information on whether there are "steps the industry can take outside the formal application review process" or "siting practices" that may facilitate faster local review.[85]

We believe that participation in a pre-application process that does not count against the shot clock can be helpful, and may be particularly helpful where an applicant proposed a large project that may implicate a variety of environmental and historical reviews. Not only does such a meeting help ensure that the application, once submitted, will be complete; it also helps identify practical timelines and reviews required for a project, and identify sites that may present particular issues. To be clear: by "facilitating faster local review," we do not mean that a shorter set of "shot clocks" may be set for projects where there is a pre-application review. We mean that pre-application reviews may result in a given project being reviewed more quickly – and one hopes, more cheaply, than would otherwise occur. By contrast, if the pre-application counts against the shot clock, localities are actually disincentivized to meet and cooperate with companies.

D. The Commission Does Not Need To Address State and Local Moratoria.

The Commission, among other things, asked commenters to submit specific information about moratoria and to describe the impact of such moratoria on them. The FCC proposed to

[85] NPRM ¶ 7.

take any additional actions necessary, such as issuing an order or declaratory ruling providing more specific clarifications of the moratorium ban or preempting specific State or local moratoria.

The FCC's rules are clear that moratoria do not stop the shot clock. What a moratorium may do is to prevent rights from vesting under state law, and permit localities time to adjust rules so that applications can be treated in a non-discriminatory fashion. The ability to develop appropriate rules is, of course, a critical part of the local decision-making process. Because moratoria by definition do not delay action on applications within a reasonable period of time, the Commission has no legal authority to preempt them.[86] We do not understand them to be in widespread use, in any case.

E. Flexibility And Communication Have Been Helpful In Deployment Tensions; Strict Federal Rules Are Not.

The NPRM seeks information on "the specific steps that various regulatory authorities employ at each stage in the process of reviewing applications, and which steps have been most effective in efficiently resolving tensions among competing priorities of network deployment and other public interest goals."[87]

Where a land use approval is required – whether for smaller or larger facilities – the process may require some form of public hearing and notice; as well as a process for appeal of decisions. The Commission should recognize that the placement of facilities in the public rights-of-way or other public property may require additional or different approvals.

In addition to necessary land use approvals, an applicant who seeks to place facilities on private land will require the landowner's permission. The same is true for facilities in the public

[86] Of course, for reasons suggested above, it would be counter-productive for the Commission to prevent providers and localities from working together to adjust existing laws and processes to reflect changes in cellular technology.

[87] NPRM ¶ 6.

rights-of-way or other public property. The permission of the landowner or trustee for the property – which will either be the local government or the state – must be obtained. Hence, in states where the right to use the public rights-of-way is subject to local consent (whether in the form of a license or franchise) the applicant must have the authority to use the public rights-of-way. Similarly, if the applicant wishes to occupy other public property (parks, buildings, easements, etc.) it will need to have authority to use that property. The location may then affect whether additional land use requirements apply or not. There may be no additional land use approval requirements for some locations or some types of installations (a city park, or a right of way may not be subject to land use regulations in many communities). The choice to deploy on property other than privately-owned land and buildings may thus trigger other requirements that affect deployment. It is helpful to localities, and speeds deployment, when provider seek and obtain these approvals *before* applying for approval of specific applications, or at least at the same time.

Local processes are constantly evolving and changing as technologies and deployments evolve. Localities either originally wrote ordinances to provide enough flexibility to distinguish among installations based on impact or are modifying or have modified ordinances to distinguish between facilities that are small and less visible, and those which are not. Land use ordinances typically identify factors (*e.g.*, whether a proposed structure is consistent with the design of a particular neighborhood; or whether a proposed structure is the least intrusive required) that would necessarily take into account the size, appearance, and physical characteristics of a proposed facility. It is certainly true that many local ordinances were originally written for macrocells, and incorporate provisions that may be appropriate for a fenced facility, but are not appropriate for a facility on a utility pole. But as a general matter, land use ordinances provide

sufficient flexibility to distinguish among types of facilities based on their physical characteristics (as opposed to the technical classifications suggested by the NPRM[88]).

What is noteworthy is that processes and ordinances are often being revised in consultation with industry.[89] As the CTC Declaration explains,[90] many communities are working with industry to develop new approaches to deployment that take wireless into account as part of the development processes associated with new subdivisions, roadway widening, or as part of a general planning processes that is designed to provide some certainty for both localities and for providers as to what may be installed, and where. We expect that given the opportunity, localities and providers may be able to develop solutions that rules could not anticipate, and may discourage. This process may take some up front time, and is distinct from the procedures that apply once an application is received under Section 332(c)(7) or Section 6409. This preliminary work may appear to result in a delay in deployment, as communities gather all industry players together to attempt to develop a cooperative solution. But the "upfront" time may translate into faster consideration of individual applications over the longer term, as providers gain a better understanding of what is required of them, and submit applications that are tailored to community requirements. This consultative process ought to be encouraged, and certainly provides no basis for additional regulations.

F. The Commission Should Encourage Further Cooperative Efforts Through Existing Mechanisms.

There are numerous existing bodies that are readily available and tasked with addressing issues related to wireless deployment. Requests or suggestions for partnerships in developing

[88] *See* discussion *infra* regarding new types of shot clocks.

[89] *See e.g.* description of City of Atlanta in Atlanta Letter of ordinance process and the intimate participation of industry in the proceedings.

[90] CTC Declaration at pp. 23-25.

model ordinances, model master license agreements, model public right-of-way franchises, best practices for responding to common challenges,[91] and preferred deployment methodologies are many of the goals that Chairman Pai outlined in his vision for the Broadband Deployment Advisory Committee (BDAC) which do not appear in the NPRM.[92]

The recent robust response of local elected and appointed officials to Chairman Pai's call to serve on BDAC is further evidence that we understand the need for such non-regulatory responses.[93] While Smart Communities joins with others in local government in expressing our disappointment at the composition of the BDAC,[94] we remain as committed to workplace and cooperative solutions.[95]

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[91] *See e.g*. Comments of the Georgia Municipal Association, Inc. ("GMA") in the Mobilitie docket (filed February 28, 2017) ("Mobilitie Docket GMA Comments"). GMA shared with the Bureau a copy of a model master license agreement, a model wireless access to the rights of way ordinance and a model agreement for placement of equipment that the association negotiated with Mobilitie. While Smart Communities does not necessarily endorse the products, it is important to note that given time and lack of interference from parties such as the FCC, local governments and industry can reach agreements as we have a common goal of ensuring the residents of a community are connected.

[92] The BDAC "is intended to provide an effective means for stakeholders with interests in this area to exchange ideas and develop recommendations to the Commission on broadband deployment… Issues to be considered by the Committee may include, but are not limited to, drafting for the Commission's consideration a model code covering local franchising, zoning, permitting, and rights-of-ways regulations; recommending further reforms of the Commission's pole attachment rules; identifying unreasonable regulatory barriers to broadband deployment; and recommending further reform within the scope of the Commission's authority (to include, but not limited to, sections 253 and 332(c)(7) of the Communications Act and section 6409 of the Spectrum Act." FCC Announces the Establishment of the Broadband Deployment Advisory Committee and Solicits Nominations for Membership, Public Notice, DA 17-110 (rel. Jan. 31, 2017).)

[93] The members of this coalition nominated no less than five official and appointed officials and supported the nominations of several others to serve on the BDAC. We are proud that Smart Communities Member Kevin Pagan, the City Attorney of McAllen, Texas is a non-voting member of BDAC. In addition, Smart Communities are represented on the FCC Intergovernmental Advisory Council.

[94] Adam Bender and Howard Buskirk, "Local Officials Worry About BDAC Composition," Communications Daily, Vol. 37, No. 106, p. 1.

[95] Additionally, there are also various activities going on at the state level. For example, concerned about the proliferation of poles in public rights-of-way, the California Public Utilities Commission recently opened a proceeding seeking comment on whether urban streetscapes can accommodate more pole attachments, the replacement of existing poles with larger poles, and possibly an increase in the number of poles. Some of the concerns raised by the CPUC included: (1) whether there is sufficient space and load-bearing capacity on the stock of existing utility poles to support additional telecommunications attachments, including wireless pole attachments, that may be necessary to provide ubiquitous, competitive, and affordable telecommunications services; and (2) what additional regulations that may be necessary, if any, to ensure that telephone companies' wireless pole attachments are designed, constructed, operated, inspected, and maintained to protect worker and public safety and preserve the

There was also the twenty-one page report to the Commission by the Federal Communications Commission's Intergovernmental Advisory Committee (IAC) delivered in June of 2016 addressing challenges and possible solutions to siting wireless communications facilities.[96] This local government work effort is not referenced in the NPRM.

The failure of the NPRM to encourage commenters to explore, let alone, promote partnership opportunities to examine the challenges being faced by all concerned with small cell and DAS deployments is disappointing and a potential missed opportunity. We sincerely hope that Commission will focus on cooperative and collaborative initiatives in existing for a rather than continuing to pursue unnecessary preemptive actions.

III. NO "DEEMED GRANTED" REMEDIES CAN OR SHOULD BE ADOPTED UNDER SECTION 332(C)(7)

Having established no predicate for action, the Commission nonetheless proposes various new measures, none of which are accompanied by any actual proposed rules, a problem in and of itself.

A. The Commission Lacks Any Factual Support or Legal Basis for Adopting "Deemed Granted" Remedies Under Section 332(c)(7).

Twice before the Commission has examined and determined that it has no authority to impose a "deemed granted" remedy for shot clocks under Section 332(c)(7).[97] As the Commission explained in 2009:

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reliability of co-located utility facilities (e.g., power lines and telephone lines). In addition, the CPUC took the unusual step of reaching out to local governments to participate — directing that notice of the Order be served on all California counties and incorporated cities and towns, as well as requiring outreach efforts to local government associations. (http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M183/K273/183273369.PDF)

[96] Report on Siting Wireless Communications Facilities available at https://transition.fcc.gov/statelocal/IAC-Report-Wireless-Tower-siting.pdf

[97] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) ("Shot Clock Order") and *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 (2014) ("2014 Infrastructure Order").

> Section 332(c)(7)(B)(v) states that when a failure to act has occurred, aggrieved parties should file with a court of competent jurisdiction within 30 days and that "[t]he court shall hear and decide such action on an expedited basis." This provision indicates Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies. As the Petitioner notes, many courts have issued injunctions granting applications upon finding a violation of Section 332(c)(7)(B). However, the case law does not establish that an injunction granting the application is always or presumptively appropriate when a "failure to act" occurs. To the contrary, in those cases where courts have issued such injunctions upon finding a failure to act within a reasonable time, they have done so only after examining all the facts in the case. While we agree that injunctions granting applications may be appropriate in many cases, the proposals in personal wireless service facility siting applications and the surrounding circumstances can vary greatly. It is therefore important for courts to consider the specific facts of individual applications and adopt remedies based on those facts.[98]

The Commission went on to define its authority under Section 332(c)(7) as limited to clarifying ambiguous terms in the statute (except with respect to RF emission). Thus, even under the Commission's own view of its authority, the Commission cannot limit the scope of local authority, compel particular results, or "grant" a permit even temporarily.

Undaunted by the past, the Commission takes a "fresh look" and seeks comment on a "deemed granted" remedy for shot clocks under Section 332(c)(7)(B)(ii). Of course as noted earlier, the Commission appears to have prejudged the need for the remedy as it only "invite[s] commenters to address whether we should adopt one or more of the three options discussed below regarding the mechanism for implementing a 'deemed granted' remedy[,]" and "seek[s] comment on whether there are other options for implementing a 'deemed granted' remedy."[99] There is no factual record to demonstrate the need for any new remedy. As noted earlier, there is an utter lack of Shot Clock violations being alleged in courts around the country.

[98] Shot Clock Order ¶ 39.

[99] NPRM ¶ 9.

Moreover, none of the new "options" proffered to support a deemed granted remedy under Section 332(c)(7) are viable. The Commission has no authority to issue local land use permits, safety inspections, or other necessary local approvals. Congress does not have the "ability to commandeer local regulatory bodies for federal purposes."[100]

1. *Option 1's Proposed Irrebuttable Presumption Is Untenable.*

In Option 1, the Commission suggests it can change the shot clocks' current rebuttable presumption to an irrebuttable presumption taking the view that Sections 332(c)(7)(B)(ii) and (v) are not "materially different" from the Spectrum Act in this regard.[101] This is not correct. Section 332 is very different from Section 6409. Section 6409(a) states "a State or local government may not deny, and shall approve, any eligible facilities request" but Section 332(c)(7) does not contain the phrase "shall approve."[102] The Commission was given explicit authority to implement Section 6409's mandatory approval language. It has none in Section 332, which by definition does not compel approval, and leave remedies to the Courts:

> This provision indicates *Congressional intent that courts should have the responsibility to fashion appropriate case-specific remedies*. …. [T]he case law does not establish that an injunction granting the application is always or presumptively appropriate when a "failure to act" occurs. To the contrary, in those cases where courts have issued such injunctions upon finding a failure to act within a reasonable time, they have done so only after examining all the facts in the case. While we agree that injunctions granting applications may be appropriate in many cases, the proposals in personal wireless service facility siting applications and the surrounding circumstances can vary greatly. It is therefore

[100] *Cablevision, Inc. v. Public Improvement Comm'n*, 184 F.3d 88, 105 (1st Cir. 1999) (citing *Printz v. United States*, 521 U.S. 898, 934, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997) ("The Federal Government may [not] issue directives requiring the States to address particular problems . . . ."); *id.* at 961 (Stevens, J., dissenting) (agreeing that the notion of "cooperative federalism" does not include a direct "mandate to state legislatures to enact new rules"); *id.* at 975 (Souter, J., dissenting) (agreeing with the majority that "Congress may not require a state legislature to enact a regulatory scheme").

[101] NPRM ¶ 13.

[102] *Cf.* 47 U.S.C. § 1455(a) with 47 U.S.C. § 332(c)(7).

> important for courts to consider the specific facts of individual applications and adopt remedies based on those facts.[103]

The Fifth Circuit in *City of Arlington* explicitly found that the shot clock provisions adopted by the Commission valid in light of the fact that they were a presumption only to be used in fact-finding by the courts.[104] Nothing in the Fourth Circuit's decision upholding the Commission's "deemed grant" in Section 6409 suggests the Court thought that its ruling somehow defined the proper role of the Commission under Section 332.[105] "The general principle is 'that Congress cannot compel the States to enact or enforce a federal regulatory program.'"[106] "The doctrine explicitly does not affect 'the power of federal *courts* to order state officials to comply with federal law' because 'the Constitution plainly confers this authority on the federal courts.'"[107] Congress delegated to the courts the right to enforce Section 332, thus ensuring that the appropriate branch of government would be in the position to direct the grant of a particular local land use permit.

Objections raised in the NPRM to the "presumption" approach previously adopted by the Commission are themselves questionable. First, the statutory language provides that a local authority must act within a reasonable period of time "after the request is duly filed with such government or instrumentality, *taking into account the nature and scope of such request* ." By definition, an irrebuttable presumption does not take into account the "nature or scope" of the request. Moreover, the legislative history makes clear that this "reasonableness" standard is not intended to push wireless applications to the "front of the line" for zoning; given the

[103] Shot Clock Order ¶ 39 (emphasis added).

[105] *Montgomery County v. FCC*, 811 F.3d 121, 129 (4th Cir. 2015).

[106] *Dakota, Minn. & R.R. Corp. v. South Dakota*, 362 F.3d 512, 518 (8th Cir. 2004) (quoting *Printz*, 521 U.S. at 935, reaffirming *New York*, 505 U.S. 144, 161 (1992)).

[107] *Dakota, Minn. & R.R. Corp. v. South Dakota*, 362 F.3d 512, 518 (quoting *New York v. U.S.*, 505 U.S. 144, 179 (emphasis in the original)).

constitutional and economic impacts of requiring preferences be given to one class of land users[108], the contrary reading urged by the Commission now is not justifiable. The legislative history to Section 332(c)(7) notes specifically:

> Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.[109]

Indeed, an irrebuttable presumption would mean that applications would be deemed approved even if local procedures requiring hearings could not reasonably be conducted within the time set by the Commission given the nature of the project, or if appeals rights from administrative actions for applicants required by state or local law prevented final action within the mandatory time frames. [110] And of course, the same legislative history is equally clear that Congress intended to strictly limit FCC intrusion into "[s]tate land use decisions…except in the limited circumstances set forth in the conference agreement."[111] An irrebuttable presumption fundamentally alters land use authority and processes in a way Congress cannot be presumed to have intended.

2. *Option 2's Lapse of Local Authority Is Illogical.*

[108] At the very least, the Commission would need to add to its Initial Regulatory Flexibility Analysis an impact of delays in siting for, *inter alia*, small businesses; developers; and all others whose applications now move to the back of the line.

[109] 1996 S. Conf. Rpt. 104-230 at p. 208

[110] For a similar reason, we believe it is clear that the Commission lacks authority to issue what are effectively

[111] 1996 S. Conf. Rpt. 104-230 at pp. 207-208

In Option 2, the Commission takes a contorted view of the preservation of local authority language in Section 332(c)(7), to suggest that failing to act on a request within a reasonable period of time can somehow result in a lapse of local authority over such applications "(i.e., lost the protection of Section 332(c)(7)(A), which otherwise would have preserved such authority), and at that point no local land-use regulator would have authority to approve or deny an application. Arguably, we could establish that in those circumstances, there is no need for an applicant to seek such approval."[112] This interpretation defies logic. All that the requirements of Section 332(c)(7)(B) do is "limit or affect" local authority. Nothing in the statute supports the concept that a failure to comply with the limitations nullifies local authority or causes it to lapse. To the contrary, the statute clearly states that a "failure to act" gives rise to a court remedy. The Commission's interpretation would render the court remedy provisions of Section 332(c)(7) completely superfluous.

3. *Option 3's Resort to General Rulemaking Authority Cannot Trump Specific Statutory Directive to Court Remedy under 332(c)(7).*

In Option 3, the Commission asks why it cannot simply promulgate a rule to implement Section 332(c)(7), and whether the legislative history "standing alone, affect[s] our authority to adopt rules governing disputes about localities' failure to comply with their obligations under Section 332(c)(7)(B)(ii) to act on siting applications within a reasonable time?"[113] Of course the legislative history is important, but it is not the only basis for the Commission's lack of authority, as the discussion above suggests. The plain language of the statute, and the court remedy contained therein, together prevent the Commission from effectively rendering the court appeals process a rubber stamp – and indeed creates significant separation of powers issues. The

[112]NPRM ¶ 14.

[113]NPRM ¶ 16.

Commission claims to be "mindful of the D.C. Circuit's admonition that 'a plain reading of an unambiguous statute cannot be eschewed in favor of a contrary reading, suggested only by the legislative history and not by the text itself,' and that '[w]e will not permit a committee report to trump clear and unambiguous statutory language.'"[114] Yet, it misdirects this as supporting the exercise of authority to issue regulations that would fly in the face of clear statutory language on remedies. While the legislative history in this case may not be dispositive per se, it does indicate that the proposed Commission action would amount to hiding a proverbial elephant in a mousehole.

IV. NO NEW OR SHORTENED SHOT CLOCKS SHOULD BE ADOPTED.

The Commission proposes several different bases for developing new shot clocks. These include harmonization of collocation shot clocks for all applications that are not subject to the Spectrum Act (or a subset of those applications) with those that are subject to the Spectrum Act. Another suggestion is to adopt different presumptively reasonable time frames for resolving applications for more narrowly defined classes of deployments based on height or location or other proposed developments, or other replacements or removals. Yet another is to align the shot clocks with NEPA/NHPA categories of deployments. Again, these are all solutions in search of a problem. There is no established need for adopting any of these rules.

Another angle explored is whether to establish different time frames for small cell or DAS deployments, or for requests that include multiple proposed deployments or, equivalently, "batches" of requests submitted by a single provider to deploy multiple related facilities in different locations. This is not a new proposal, but rather one that was proposed in the Notice for the Mobilitie docket. It is problematical, and the need is not supported in the docket. As the

[114] NPRM ¶ 16.

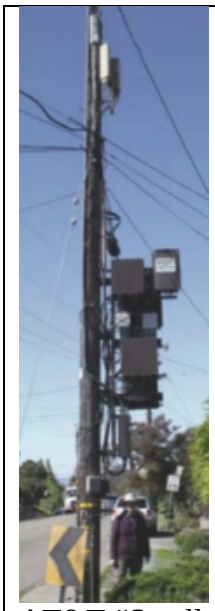
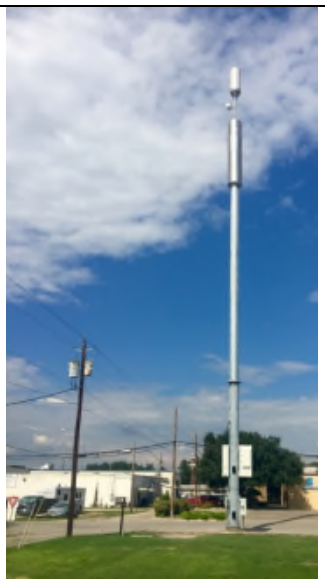
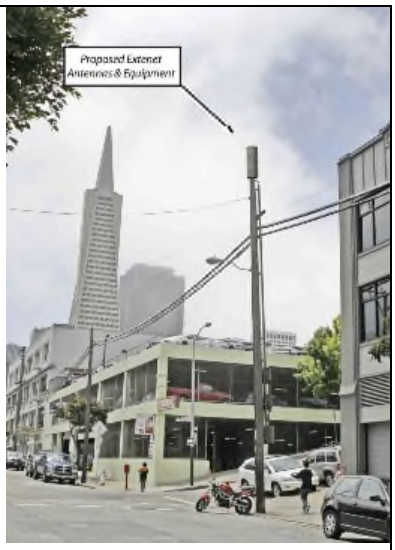
CTC report points out, most of what industry seeks to characterize as "small cell" deployments are not designed to serve areas that lack broadband service. Many of the deployments are occurring in areas where residents have multiple options for high-speed access to the Internet, whether via licensed or unlicensed frequencies. Many of the deployments (in Montgomery County for example) are occurring in areas where hundreds of facilities have already been authorized.[115] The issue is usually the quality of the service, and in some cases, those concerns may have to do with the delivery of services (like video services) that are not the focus of Section 332(c)(7).

The term "small cell" is typically used to describe an installation that serves a small area – not to distinguish between facilities that are "small v. those that are large."[116] For purposes of this NPRM, it is important to recognize that what falls within the rubric of a "small cell" at any given site can actually involve many different pieces of equipment, some of which could be quite large and quite intrusive. Thus, as CTC explains, at any given location, a "small cell" may involve a support structure (ranging in size from a Mobilitie tower to a more conventional utility pole); an antenna; radio units; power supplies/electric meters/disconnects/cabling; and potentially back-up power supplies.[117] Some of these facilities may be mounted on the tower or pole; some may be placed in a vault, and some may be ground-mounted. A facility might look like any of these:

[115] *See* Mobilitie Docket Montgomery County Comments.

[116] CTC Declaration at p. 2.

[117] CTC Declaration at p. 6.

 AT&T "Small Cell," Oakland	 Mobilitie "Small Cell"	 ExteNet "small cell," San Francisco

The CTC report includes additional examples. As CTC explains, small cell sizes may approach or exceed the size of many monopoles or macrocells.[118] Indeed, many small cells may actually utilize the same equipment that is utilized on traditional macrocells, but the equipment may serve a smaller physical area because of placement or powering.

The problems presented by various "small cell" installations can vary dramatically and argue against adoption of a unique and shorter "shot clock" for these applications. The Mobilitie 120 foot "small cell" shown in the photograph above will require installation of a significant foundation that could extend well below ground level and require analysis of the soil underneath the facility and the support required to prevent the tower from falling. It could also, of course, raise Section 106 Historic Preservation Act issues.[119] The AT&T facility pictured on the previous page may create significant aesthetic concerns if proposed in a residential area that

[118] CTC Declaration at pp. 6-8.

[119] Exhibit 5 is a small cell proposal for a historic district in Monroe, Michigan and the City's response to a facility 40" in diameter with a 50" base plate, and rises 100' above ground. The tower and structure are proposed to be located very near a roadway, and with a foundation of unspecified size.

would not be presented if located in an industrial area. The placement of any new structure in the rights of way, whether categorized as a small cell or not, can raise significant issues for roadway engineering, safety, and coordination with other utilities.[120] The time required to address these issues is not easily limited by adopting a definition of "small cell" unless small is literally defined to exclude towers and new structures altogether, to only apply to modifications of existing utility poles where there is no need for any excavation or strengthening, and where all facilities associated with a structure are in fact "small" and not capable of expansion. A more favorable shot clock for "small cells" will add complications without accurately identifying a class of facilities for which review time may logically be shortened. It is worth emphasizing that there have been very few cases that in fact turn on a failure of a community to act in a timely way, particularly once the industry applicant acknowledges local governance rights over their public rights-of-way, and industry has never shown that a shorter time frame is required or would significantly to cut deployment times, given, for e.g., the time required prior to beginning construction (*e.g.*, for make-ready work).

As suggested above, as a factual matter, the deployment of small cells in the public rights-of-way presents problems, including safety problems, that are significant, and may involve significant externalities.

Thus, as Mr. Puuri points out, the placement of new structures in the public rights-of-way creates an ongoing risk to public safety that cannot be avoided.[121] The installation of wireless facilities can also create long-term stresses on the road bed, interfere with drainage, and make it more expensive to maintain and expand the roadway, or to improve other utilities. The cost to

[120] Puuri Declaration at p. 2.

[121] Puuri Declaration at p. 2.

local governments that result from the addition of new structures to the public rights-of-way may be millions or billions of dollars annually.[122]

Moreover, the placement of small cells – depending on their size and visibility – may affect neighboring property values. As Mr. Burgouyne explains, the literature suggests that placement of utility infrastructure aboveground does affect property values.[123] That impact is related to the size and visibility of the installed structures. As even a small reduction in value of homes in a neighborhood may have multi-million dollar effects – it becomes very important to minimize the impacts of proposed installations.

This is particularly so since, as the CTC Declaration points out, providers often do have alternative placement options, and technology may permit provision of advanced services without the negative impacts.[124] Indeed, if localities can respond to the potential problems by establishing placement requirements, that may reward innovators who can design networks that minimize impacts. Rather than discouraging deployment, strong local standards may encourage companies who have traditionally designed and built municipal infrastructure to develop innovative designs for deployment of next generation wireless.[125]

The stakes are enormous. Smart Communities call on the Commission to recognize that actions with a singular focus on facilitating deployment without any consideration of the

[122] The costs associated with using the rights of way can be significant. The Puuri Declaration includes simple example of costs associated with making a roadbed and roadside safe for a single small cell installation where there are almost no competing utilities; the road is a rural road, and the design of the facility will not affect the roadway itself in any way; and no special construction is required for the facility. The costs listed are costs associated with modifying the roadside, and do not include costs associated with reviewing plans and developing specifications for the site; do not include costs associated with inspecting the installation during construction or periodically thereafter. The estimates do not include joint and common costs associated with maintaining the road and the roadside areas so that those are safe for all users, and it does not include special costs that may arise when the roadway or other utilities need to be moved. It does not reflect costs associated with responding to emergencies involving the structure. Those costs translate into time and effort required to review and process applications.

[123] Burgoyne Declaration at p. 3.

[124] CTC Declaration at p. 16.

[125] CTC Declaration at p. 22; ECONorthwest Declaration at p. 5.

community context could have enormous, and negative economic effects, affecting millions (if not billions) of dollars in community investments made not just for aesthetic reasons, but for financial and health and safety reasons.

To provide one example: Myrtle Beach is one of the nation's most popular tourist destinations, and the most popular destination in South Carolina, attracting more than 17 million visitors per year to a city with a permanent population of roughly 30,000. That tourism – primarily driven by the area's beaches, golf courses and attractions – has been the engine for tremendous growth in the City and the nearby entire Grand Strand, in both Horry County and Georgetown County. Myrtle Beach's unemployment rate is below the national average, while the metropolitan area growth rate is the second fastest in the nation (2014-2015 Census estimate).[126]

Myrtle Beach accounted for nearly four percent (3.94 percent) of the state's 2014 retail sales. Tourism is South Carolina's main industry, and the Grand Strand is the engine behind it. Negative impacts on tourism in Myrtle Beach have a ripple effect across state government and state coffers, since Horry County and Myrtle Beach are "donor" locations within the state, providing state funds for other locations that do not have that tourism base. Conversely, positive impacts on tourism generate jobs, sales tax, accommodation taxes, hospitality taxes and economic stability both locally and statewide. The economic impact is astounding. In 2015, tourism generated $20.2 billion in economic activity statewide, a 6.1 percent increase over 2014, and the fourth straight year of growth. Tourism is South Carolina's largest industry, supporting one in 10 jobs and generating $1.5 billion in state and local tax revenues.[127]

[126] See http://www.myrtlebeachonline.com/news/local/article67886402.html.

[127] https://greenvillejournal.com/2017/02/22/officials-tourism-grew-to-a-20-2-billion-for-sc-in-2015/

Maintaining and responding to that growth is a challenge. The City competes nationally with Las Vegas and Orlando at convention center level; but as it attracts most of its non-convention visitors from the East Coast, including the Midwest and Canada, it must compete with other coastal destinations along the east coast shoreline.[128] To compete, the City has developed a comprehensive and holistic approach to enhance its tourism economy that has steadily grown since the 1950s. The public investment includes more than $80 million in the Myrtle Beach Convention Center, the Convention Center Hotel and the Myrtle Beach Sports Center. The City has planned, financed and worked hard to develop the 10 mile commercialized Ocean Boulevard, its public beaches and Boardwalk, investing more than $100 million in public improvements to streets, sidewalks, the boardwalk, underground utilities, deep-water ocean outfalls, public parks, new streets and new recreational spaces. The City of Myrtle Beach partnered with the local electric utility, Santee Cooper, to fund the removal of overhead utility lines from major public streets and thoroughfares, spending more than $30 million on that effort since 1999. The City has aggressively incorporated this holistic approach to growing its tourism economy through long-range capital improvement plans and budgets. The City incorporates aesthetic requirements into every development agreement, every Municipal Improvement District, every Tax Increment Financing District and every approval process. How Myrtle Beach looks is a key determinant of how well its economy will function and grow.

Moreover, and on a practical level, such a holistic approach is required for public safety. The area is subject to hurricanes, so it seeks to avoid preventable damage and limit repair time through strict building codes and adherence to FEMA's and other agencies guidelines. An

[128] http://www.myrtlebeachareachamber.com/research/docs/24theditionstatisticalabstract.pdf

obvious goal is to limit the number of structures that can create hazards to the public and to property during high winds. Moving utilities underground was part of those efforts.

Most of the tourists who visit Myrtle Beach arrive by automobile, but they rightly expect to walk and bicycle through the central beach areas and residential districts, which means that the City has a significant interest in minimizing obstructions in the public rights-of-way. Looking ahead, the City has identified as much as $2 billion of required road improvements,[129] while facing significant reductions in available state and federal funding – additional infrastructure that may make improvements more difficult simply adds to those costs.

Indeed, understanding these future growth issues, the City met with all interested utilities during the underground conversion discussion to ensure that the underground infrastructure would include sufficient conduit and other structures to avoid future trenching, road blockages or other retrofitting.

The City is now receiving requests that it allow installation of above-ground towers on its beach public right-of-way. Installation in the public right-of-way is *not* needed to provide service. The beachfront is lined with multi-story buildings and private parking lots (with lighting structures) that could easily support placement of wireless facilities. In fact, off-road placement on private property may lead to more coverage, as it would enable a provider to better serve the hotels that line the beach. The main reason providers wish to use the public property appears to be cost – the idea that it will be cheaper for them to place facilities in the public's public rights-of-way, rather than to secure appropriate private property, even if the impact on surrounding businesses, tourism and employment could have long-term negative consequences that are far greater than the cost of negotiating to use private property.

[129] http://www.myrtlebeachonline.com/news/local/article67886402.html

Based on that City's experiences, those costs could be significant. Nonetheless, the City is currently working with providers of infrastructure and services to create a development guide that would allow placement of some facilities in the public rights-of-way – the goal being to try to develop safe harbors to which all providers may design rather than dealing with applications on a case-by-case basis. This may involve (1) use of street lights or other structures that can be used to hide facilities; (2) limiting placement in the public right-of-way in sensitive areas to facilities that meet stringent design requirements, and otherwise requiring facilities to be first placed in locations where they are not going to create harms; and (3) limiting new facilities that are permitted, and limiting the height and placement to avoid risks to vehicles, pedestrians, and roadbeds.

Even this process is not simple. The use of street lights for placement of wireless facilities is not as simple as one may imagine. Street lights themselves are evolving, and may incorporate sensors and other infrastructure for government and public use. It is important that use by wireless providers not foreclose those other important uses. Moreover, the replacement of one street light structure with another heavier structure may create maintenance, replacement and safety issues that did not exist before. And, as street lights are often installed and maintained pursuant to complex tariffs that, among other things, effectively require separate metering for each powered user.

Myrtle Beach's experience, the experience of the other Smart Communities and the expert declarations indicate:

First, placement of wireless facilities has significant initial and ongoing impacts on the public rights-of-way. The impact may be focused on the antennas, but it is not limited to the antennas; for example, 120-foot poles could block the public right-of-way, create permanent

obstructions for placement of other utilities by virtue of the foundations required to support that structure, and create hazards that do not otherwise exist.

Second, the problems can and are being addressed, but addressing the problems may require coordination with other utilities and stakeholders that does require some time. Additional rules will not speed the process, and there is no reason to believe that a shortening of the shot clocks will provide a "reasonable" period of time for localities to act on applications.

Third, the Commission should recognize its own rules may be a barrier to creative solutions to deal with redeveloped areas, historical areas and residential areas (particularly underground areas). It ought to encourage approaches that allow for creation of safe harbors for conforming providers to place facilities in the public rights-of-way, while limiting the ability for those who place within the safe harbors to expand those facilities.

Before adopting any new shot clocks, the Commission needs to carefully consider the negative cost and impact of all those rules, and if the data is not clear, study those impacts in detail.

A. The Commission Should Not Be Setting Shorter Time Frames For Either Batch Or Small Cell Applications

Smart Communities would offer that while we have some concerns that more time is actually required, at least the Commission's current time frames allow the parties, and ultimately the courts to assess the reasonableness of the time taken under the circumstances. We doubt the Commission can come up with a rational rule that harmonizes the time required to review 400 applications submitted in one day with submission of 2, nor should it attempt to.

Smart Communities believe that applications can be more easily considered in batches if localities can create "safe harbors" that allow entities to design to specifications created by the community, at least if the specifications are enforceable. But batch applications often exceed the

capacity of a locality to handle with existing staff, since in many cases, each site has to be independently evaluated and considered , and because modifications to one part of the batch (if, for example, installations are proposed in a historically protected area) may require changes to other proposed sites.[130]

There are additional costs and additional time associated with consideration of batch applications that can potentially be addressed through local permitting fee mechanisms that permit speedier review, i.e. the applicant pays for the additional costs to the community (additional staff, for example) required to review the application.[131] But federal rules here will not be very helpful, since the process is most easily worked out cooperatively at the local level for particular projects. And, if shot clocks are shorter, particularly in smaller communities, and even in many large ones, additional staff will be mandatory, and those costs, cause by the Commission, must be passed on to the applicant.

Moreover, setting aside the problems created by incomplete applications, the evaluation of applications for placement of "small cells" in the public rights-of-way is not simple, and does require a stringent review. The issues raised by Mobilitie's proposed placement of 120-foot towers in the rights of way – are just one example. More generally, in contrast to applications for use of private land, the public right-of-way is a shared space, which must accommodate vehicle traffic, pedestrian traffic, and a large variety of utilities. The Puuri Declaration explains some of the problems presented by adding structures to public rights-of-way, and why it is critical that proposals for placement of facilities be carefully reviewed. As discussed below, many of the areas that are most trafficked and that are particular targets for small cell

[130] CTC Declaration at p. 21.

[131] CTC Declaration at p. 21. The City of Los Angeles for instance affords applicants the opportunity to pay an additional fee to receive expedited service.

deployment are also areas where the city has spent millions of dollars beautifying the area to particular design standards. While certainly not impossible, it is often more difficult to disguise facilities, particularly where agreements on design require the consent of the wireless providers, the community, and a private utility that may have an interest in infrastructure. Moreover, the use proposed – installation of vertical structures that could be (and historically have been) placed outside the public right-of-way – is not a necessary public right-of-way use (normally public rights-of-way are dedicated to linear and transiting uses, and uses related to transportation). The placement of incongruent structures in the public rights-of-way creates different problems, and may create legal issues depending on any limitations on uses of the public rights-of-way or associated utility easements.[132] Thus, applications for use of the public rights-of-way may require more stringent review than non-public right-of-way applications – which is to say, approval of small cells of the sort that are the focus of the NPRM may require as much or more time than approval of macrocells.[133] Those problems may be particularly significant in areas where all other utilities are underground, where the installation presents not only new safety but also aesthetic issues.

[132] *See D'Andrea v. AT&T,* 289 Mich. App. 70 (2010). See also unpublished Opinion following post-trial appeal: *D'Andrea v. AT&T,* 2014 Mich. App. Lexis 1570 (2014). As Mr. Burgoyne explains, intrusive small cell installations may affect property values; even small reductions in property values could have significant economic effects. (Burgoyne Declaration at pp. 2, 8)

[133] The placement of a node may have significant ripple effects that are recognized in the Programmatic Agreements, are not typical of macrocells, and that are of appropriate concern in determining whether the placement should be authorized. Each node on a DAS system may require 4-6 dedicated fibers that connect to a larger fiber bundle. Placement of the fiber may require significant roadway trenching. The consideration and mitigation of those impacts may be time-consuming, particularly if each entity asserts the right to build the particular network facilities it wants, with the connectivity it desires, at the time it prefers, with no interest in collocation at any time…which is what Mobilitie is effectively asking the Commission to order. In Myrtle Beach, trenching along the Ocean Boulevard during summer could cause millions of dollars in losses to businesses and to hotels. To avoid the trenching problem, the City installed conduit in consultation with utilities to limit or avoid the need for disruption. That should speed deployment, but only does so if localities can require wireless service and facilities providers to use their assets, or otherwise act to protect against disruption.

Receiving applications in batch for small cells does not necessarily speed the process either. There may be some ways to manage batches of applications to speed certain aspects of the review. For example, if the same design is used in the same zoning area, that design may be approved for the entire area, subject to certain restrictions (e.g., a design generally appropriate may not be appropriate in front of an historic landmark). But the degree to which batching is helpful may depend on the structures proposed (new v. additions to existing facilities) and the size and visibility of the installations; and on the coordination required with other utilities. Mandatory federal rules will either be so complex as to dramatically add to compliance costs (and will require a careful Initial Regulatory Flexibility Analysis for small communities); or accomplish very little in terms of an improvement over existing rules.

PART 3: NOTICE OF INQUIRY

I. SECTION 253 DOES NOT APPLY TO PLACEMENT OF WIRELESS FACILITIES.

A. If Broadband Is Reclassified As An Information Service, Section 253 Would Not Apply.

The NPRM and NOI focus on the "regulatory impediments to wireless network infrastructure investment and deployment … in order to promote the rapid deployment of advanced wireless broadband service to all Americans."[134] The Commission, in the Open Internet docket, is proposing to reclassify broadband Internet access service as an information service, and no longer as a telecommunications service.[135] Section 253, by its terms, protects the provision of telecommunications service; even if it did apply to wireless facilities, it would not apply to broadband Internet access service, whether provided wireless or via wireline, if the Commission were to reclassify the service.

[134] NPRM ¶ 2.

[135] *In the Matter of Restoring Internet Freedom,* WC Docket No. 17-108 (rel. May 23, 2017) at ¶¶ 24-43.

B. Section 253 Does Not Apply to Wireless Facilities

To start its inquiry, the Commission seeks comment on the interplay between Sections 253 and 332(c)(7), specifically asking whether the substantive obligations of these two provisions differ.[136] The Commission has retread this ground several times over and it was recently addressed in the Mobilitie docket. As was made clear in that docket, Section 253 has no role whatsoever.[137] Section 332's plain language makes clear it is the only provision which applies to placement of personal wireless facilities, as does the statute's legislative history. Section 332(c)(7)(A) states plainly, that, except for four limitations at (7)(B):

> nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.[138]

And if there was any additional doubt as to the inconsistency between Section 332(c)(7) and Section 253, the Conference Report explained:

> It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) . . . the courts shall have exclusive jurisdiction over all other disputes arising under this section.[139]

Consistent with these plain directives, the Commission has never used its authority under Section 253(d) to preempt any state or local action (or inaction) involving wireless facilities siting.[140] As the law specifically provides that nothing in the Act "shall limit or *affect* the authority of a State or local government or instrumentality thereof over decisions regarding the placement,

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[136] NPRM ¶ 89.

[137] Mobilitie Docket Smart Communities Comments at pp. 50-52.

[138] The declaration is reinforced by Section 601(c) of the Telecommunications Act of 1996, stating that "the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided . . . ."

[139] H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 208 (1996), 1996 U.S.C.C.A.N. 124, 221-22

[140] *See Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, 31 FCC Rcd 13360 (WTB 2016) ("Mobilitie Public Notice") at n.33.

construction, and modification of personal wireless service facilities," the Commission could not, for example, rely on Section 253 (or any other section of the Act) to prevent, impair or any way "affect" the exercise of that authority by limiting what localities may charge for review of applications – thereby preventing localities from engaging in an informed review of a proposed site. [141]

C. Section 253 Contemplates Case-By-Case Decision Making.

It is not generally appropriate for the Commission to use declaratory rulings to preempt under Section 253, even assuming it did apply. The statute, in Section 253(d), defines precisely how and under what circumstances the Commission may entertain a "prohibition" challenge under Section 253(a) (and precludes Commission resolution of issues that arise under Section 253(c). Section 253(d) envisions a case-by-case, tailored determination: the Commission must provide "notice and an opportunity for public comment" and then may only preempt "such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." In a 1997 decision, the Commission explicitly rejected an argument that Section 253 preempts on a *per se* basis, and correctly ruled that the statute requires a factual showing:

> We cannot agree that the City's exercise of its contracting authority as a location provider constitutes, *per se,* a situation proscribed by section 253(a). The City's contracting conduct would implicate section 253(a) only if it materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market for payphone services in the Central Business District. In other words, the City's contracting conduct would have to *actually prohibit or effectively prohibit* the ability of a payphone service provider to provide service outdoors on the public rights-of-way in the Central Business District. As described above, the present record does not permit us to conclude that the City's

[141] If Section 253 did apply, it would not provide the Commission broad authority to regulate local zoning decisions, prices charged for review of applications, or even use of proprietary properties, for reasons more fully explained in the comments filed by Smart Communities in the Commission's companion wireline proceeding (WC Docket No. 17-84).

> contracting conduct has caused such results. If we are presented in the future with additional record evidence indicating that the City may be exercising its contracting authority in a manner that arguably "prohibits or has the effect of prohibiting" the ability of payphone service providers other than Pacific Bell to install payphones outdoors on the public rights-of-way in the Central Business District, we will revisit the issue at that time.[142]

The Commission later reinforced the point:

> With respect to a particular ordinance or other legal requirement, it is up to those seeking preemption to demonstrate to the Commission that the challenged ordinance or legal requirement prohibits or has the effect of prohibiting potential providers ability to provide an interstate or intrastate telecommunications service under section 253(a). Parties seeking preemption of a local legal requirement such as the Troy Telecommunications Ordinance must supply us with *credible and probative evidence* that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c).[143]

Since this NOI does not identify *any* particular ordinance, or even the communities that allegedly adopted invalid statutes or regulations, these requisites are not satisfied. Without particular facts the Commission is certainly not in a position to preempt only "to the extent necessary," as the statute requires, to prevent a prohibition (particularly since there is no prohibition shown). As CTIA acknowledged in the Mobilitie docket, the Commission's actions so far under Section 253 confirm this procedure; previous Commission decisions under Section 253 have been "confined to the facts in a particular jurisdiction, such as the language of the law or its impact on particular wireless providers."[144]

II. THERE IS NO NEED, AND LIMITED AUTHORITY, FOR THE COMMISSION TO CLARIFY THE MEANING OF "PROHIBIT OR HAVE THE EFFECT OF PROHIBITING" IN SECTIONS 253 AND 332(C)(7).

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[142] *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Calif.*, 12 FCC Rcd 14191, 14206, para. 38 (1997) ("California Payphone") (emphasis added).

[143] *In the Matter of TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, FCC 97-331, 12 FCC Rcd. 21,396 (September 19, 1997).

[144] CTIA Comments in the Mobilitie Docket ("Mobilitie Docket CTIA Comments") at p. 20.

The Commission seeks comment on whether additional guidance to interpret the phrase "prohibit or have the effect of prohibiting" in both Section 253 and Section 332(c)(7) is needed, reviving, in part, a question it also asked in the Mobilitie docket.[145] No further guidance is needed because the courts have adopted the Commission's formulations in both contexts and developed a rich case law applying those standards.

A. "Prohibit or Effect of Prohibiting" Sets a High Bar.

The courts have made clear that "prohibit or effect of prohibiting" in both statutes is a high bar –it does not mean impair, or make more expensive or difficult.[146] The statute's terms mean what they say, "prohibit." The Ninth Circuit's interpretation of Section 253 demonstrates the high bar of "prohibit or effect of prohibit." Specifically, in *Sprint v. San Diego*, the Ninth Circuit undertook an extensive analysis of Sections 253 and 332(c)(7) and concluded that:

> Under both, plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could potentially prohibit the provision of telecommunications services is insufficient.[147]

Further, while the Commission cites to a diversity of opinion as among the circuits, the correct reading is laid out clearly by the New York City Department of Information Technology & Telecommunications filings also cited in the *NOI*,[148] to wit: the Solicitor General posited in the United States' brief on certiorari in *Sprint* and *Level 3*:

> [S]ince the Second and Tenth Circuits' decisions relying on Auburn were issued, the Eighth Circuit has declined to follow Auburn, and the en banc Ninth Circuit has overruled it. In light of those developments, it is unlikely that additional circuits will

[145] NPRM ¶ 91. Cf. Mobilitie Public Notice at p. 11.

[146] As explained above, Section 332(c)(7) bars application of Section 253 to wireless infrastructure, however, since the terms are identical in the two provisions, courts have tended to interpret them in a similar manner.

[147] *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008) cert. den. 129 S. Ct. 2860 (2009)

[148] Letter from Michael Pastor, General Counsel, New York City Dept. of Information Technology and Telecommunications, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-3 (filed Apr. 12, 2017).

> follow the repudiated *Auburn* decision, and those that already have done so may reconsider the issue. Indeed, even the petitioners here do not attempt to defend the interpretation of Section 253(a) articulated in Auburn.[149]

No current diversity of opinion exists as the interpretations concluding that a state or local ordinance could violate the prohibit standard only if such ordinance "might possibility" result in a prohibition. For this reason, the Commission is not permitted, for example, to conclude that non-cost-based fees violate the statute because there is no clear connection between cost-based fees and the statutory focus on prohibition.[150] The standards adopted under this case law is interpreting the plain language of the statute, which limits the Commission's authority under *Chevron*.[151]

As it happens, given the plain language of the statute, the courts are applying the Commission's *California Payphones* standard. All agree that the pertinent question under section 253(a) is "whether an action 'materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'"[152] And in the Mobilitie docket, CTIA and Verizon cite approvingly to this standard.[153] Even if it could do so, it would make little sense to upset the applecart and reinterpret Section 253 after the vast majority of the federal judiciary has adopted the Commission's view in *California*

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[149] Letter from Michael Pastor, General Counsel, New York City Dept. of Information Technology and Telecommunications, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, at 1-3 (filed Apr. 12, 2017) (quoting 2008 U.S. Briefs 626 at 17; 2009 U.S. S. Ct. Briefs LEXIS 1796 at 29).

[150] NPRM/NOI ¶ 93.

[151] *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007) ("under a plain reading of the statute"); *Sprint Telephony PCS v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) ("our conclusion rests on the unambiguous text of § 253(a).").

[152] NPRM ¶ 90. See also *P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) and *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), both of which quote *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Calif.*, 12 FCC Rcd 14191, 14206, para. 31 (1997) ("California Payphone").

[153] Mobilitie Docket CTIA Comments at p. 22; Verizon Comments in the Mobilitie Docket at p. 11 (citing *California Payphone* ¶ 31).

Payphone, as that would only serve to cause delay through uncertainty and litigation, while presumably dampening investment in advanced wireless networks. And while the Commission refers to some difference between the level of showing required to demonstrate a violation,[154] as the Commission stated in the Mobilitie docket: "[c]ourts generally agree that a carrier may establish that a land-use authority's denial of its siting application 'prohibits or has the effect of prohibiting' the provision of service by showing that it has a significant gap in service coverage in the area and a lack of feasible alternative locations for siting facilities." The marginal benefits of resolving the actual disputes among the Circuits – which may prove more apparent than real in application – are outweighed in this instance by the fact that providers and localities have developed solutions based on the solutions in their circuits.

B. Case-By-Case Decision Making is Qualitatively Better and Contemplated by Statute.

While the Commission may have the authority to adopt particular guidance pursuant to declaratory rulings under Section 332(c)(7), regarding the terms "significant gap" and "least restrictive alternative" tests developed by the courts (subject to the limits imposed by law), the application of a legal standard to facts is the precise scenario where case-by-case decision-making is required — not general standards or prescriptive national rules. Localized zoning decisions and their real-world impacts on provider offerings are well-suited to district court proceedings to ascertain facts and apply relevant legal standards. Section 332 contemplates this more particularized approach, explicitly directing parties dissatisfied under Section 332(c)(7) to commence an action in any court of competent jurisdiction,[155] and only grants authority to the

[154] NPRM/NOI ¶ 93.

[155] 47 U.S.C. § 332(c)(7)(B)(v).

Commission for considering disputes with regard to Radio Frequency ("RF") emissions.[156] The Commission's own rules presume a specific challenge to a specific provision:

> In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority and petitions for relief under 47 U.S.C. 332(c)(7)(B)(v), the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption.[157]

That is, providing guidance without the benefits of specific facts seems both unnecessary (for reasons stated in the preceding section), unwise, and inconsistent with the Commission's own rules.

III. PROPRIETARY/REGULATORY DISTINCTIONS SHOULD BE MAINTAINED

A. The Commission Should Reaffirm Its 2014 Infrastructure Order's Clear And Proper Distinction Between State And Local Governments' Regulatory Roles Versus Their Proprietary Roles As "Owners" Of Public Property And Resources.

The Commission must and should continue to respect the proprietary authority of local governments, consistent with its own precedent and well-established legal and constitutional principles.

The Commission begins its discussion of the proprietary/regulatory distinction (at paragraph 95 of the NOI) by seeking to draw a parallel between the language in Section 253 (permitting preemption of laws and legal requirements) and Section 332(c)(7)(b), which permits preemption of "regulations." The discussion appears somewhat misplaced to the extent that it suggests Section 253 does apply to proprietary functions, but also because it requires the Commission to ignore pertinent language in Section 253. The operative language in Section 332(c)(7) begins in subsection (a), which prevents the Commission from taking any action that

[156] 47 U.S.C. § 332(c)(7)(B)(iv).

[157] Note 1 to 47 C.F.R. § 1.1206(a)

may "affect" a decision regarding wireless placements. Subsection (b) then permits preemption only where "regulations" of placement fail to meet certain standards. That is, Section 332(c)(7) only permits preemption of certain local regulatory decisions regarding placement; it protects from preemption any non-regulatory decisions, including decisions with respect to proprietary property.[158]

In any case its 2014 Infrastructure Order, adopted October 17, 2014, the Commission appropriately concluded that the mandates in Section 6409(a), Section 253 and Section 332 apply only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities. The Commission noted:

> Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. We find that this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt "non regulatory decisions of a state or locality acting in its proprietary capacity."[159]

The proprietary regulatory distinction is legally correct and consistent with constitutional principles. Any regulation of state property is, after all, an intrusion on important aspects of state sovereignty: the federal government cannot deprive a state (or its authorized subdivisions) of the power to control the property within its own borders without infringing upon the state's sovereignty.[160] The Commission wisely declined to attempt to define the difference between

[158] The choice to charge rent, and what rent to charge is critical in making any decision to provide access to property for siting, just as they may be for private entities At least with respect to wireless facilities, those choices are protected from preemption or complaint under any provision of the Acts.

[159] 2014 Infrastructure Order at ¶ 239.

[160] *United States v. Alaska*, 521 U.S. 1, 5 (1997) (ownership of lands is an essential attribute of sovereignty); *Pollard v. Hagan*, 44 U.S. 212, 224 (1845) (federal government's exercise of a power of municipal sovereignty over lands within a state would be "repugnant to the Constitution"); *see also Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors*, 507 U.S. 218, 231-232 (1993) (labor contract not

proprietary and regulatory functions, as it has no particular expertise to do so, and the issue is one of constitutional dimension, complex and affected by state law; it must refrain from doing so in this docket as well.

Courts have consistently recognized that in "determining whether government contracts are subject to preemption, case law distinguishes between actions a state or municipality takes in a proprietary capacity—actions similar to those a private entity might take—and actions a state or municipality takes that are attempts to regulate. The former type of action is not subject to preemption while the latter is."[161] Because the Telecommunications Act[162] is subject to this maxim, it "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity."[163] Thus, when local governments enter into contracts for use of property they own (whether land, buildings, or infrastructure in public rights-of-way), neither Section 253 or 332t apply. For example, complaints about charges for access to light poles are not cognizable, because such contracts clearly fall outside of Section 253 (if wireline facilities are involved) and 332(c)(7) (if wireless is involved). Likewise, the Commission has no general authority to compel localities to grant access, any more than it has authority to compel private entities to grant access; and it has no authority to effectively turn local property into common carriage property.[164]

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preempted by National Labor Relations Act because it was not government regulation but rather constituted proprietary conduct).

[161] *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000).

[162] 47 U.S.C. § 151 *et seq*.

[163] *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002); *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir. 2004) (recognizing that Section 253(a) preempts only "regulatory schemes"); *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 225 (1993) (pre-emption doctrines apply only to state regulation).

[164] *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

B. **There Are Good Public Policy Reasons For Maintaining This Distinction**

1. *Local governments must retain their proprietary authority to satisfy their numerous duties to constituents.*

Local governments, including cities and counties, own and have responsibility for a wide range of valuable property, including lands, buildings, public works facilities, infrastructure in rights-of-way, and much more. Local governments effectively own and manage their property as a private owner would. As the owner, landlord and trustee of such public properties, local governments have a fiduciary duty to maintain their property and to protect the public safety and welfare of their residents. Additionally, the taxing and assessment authorities of local governments impose significant fiduciary obligations to make sure that public resources are used with care and accountability in the sole interest of the public. Thus, as a policy matter, local governments must retain control of their property. This is essential to maintain the condition and financial value of property, to ensure that government operations run smoothly on a day-to-day basis in the face of constantly shifting exigencies, and to protect against security and safety breaches that could harm local governments and the public.

With respect to the Commission's question about whether a distinction should be drawn based on whether State or local actions advance those government entities' interests as participants in a particular sphere of economic activity (proprietary) versus their interests in overseeing the use of public resources (regulatory). The question seems a bit convoluted. A private owner of a piece of property will necessarily have an interest in the property as a market participant, but will also have an interest in preserving and overseeing that property to maximize its value. An owner of a private subdivision, for example, may maximize housing values by requiring all utilities to be underground and by establishing uniform, aesthetic requirements. The owner of a mall may, to maximize rentals, oversee uses to ensure a diverse merchant base

attracts customers. That is, the line the Commission seeks to draw (being a participant v. overseeing use) is not the a sound one. It is why, as noted above, the Commission has traditionally left the distinction to the courts.

Local governments, including municipalities, agencies and special districts, must operate and manage their proprietary properties to meet their primary purposes, often while grappling with budgetary and staffing limitations. Any requirement that might force them to open their properties to other uses unrelated to the property's primary public purpose, such as accommodating wireless equipment placement, could have the effect of placing enormous stress and pressure on these properties that may exceed a local government's management capabilities and jeopardize their continued safe and optimal operation.

To be sure, local governments may determine that it is beneficial and in harmony with their fiduciary duties to the public to maximize use of their property and facilities through leasing and licensing arrangements. Such agreements constitute proprietary – not regulatory – leases and licenses that are indistinguishable in critical respects from private leases or licenses for access to privately owned property. Such agreements must consider, among other things, the availability of staff and resources to oversee the additional uses of the property, as well as safety and security risks associated with allowing third parties to access critical infrastructure. These agreements are necessarily ancillary to a district's duty to provide vital public services, such as delivery of potable water or sanitary sewer services, and to maintain the associated infrastructure.

2. *Special districts provide a window into the varied and unique responsibilities of local governments and their significant interest in ensuring their proprietary authority is not disturbed.*

Special districts are limited special purpose local governments, distinct from cities and counties. They provide within their jurisdictions particular public services, such as water, sewer,

fire protection, parks and recreation, or flood control. As with all local governments, special districts have significant and reasonable justification for seeking to retain their authority over the public property they control, especially in light of their unique purposes and limitations.

Special districts derive funding for their services through several sources, including fees and charges, property taxes and special assessments. For example, special districts that provide water, sewer and solid waste disposal services generally rely on fees and charges imposed on customers who directly receive such services. Like other local government entities, special districts are subject to strict state constitutional and statutory restrictions governing the rates they may charge for services such as water or sewer service expansion, as well as for other fees and charges they may impose for permits and regulatory matters. Additionally, as with many other local government entities, special districts face significant environmental regulation and operational requirements under law.

Many such districts have no zoning-type authority at all, and instead lease or license space to wireless providers and others in their role as owners of valuable public property . As noted above, the Commission's conclusion that Section 6409(a) does not apply to acts of property owners (including special districts that provide public services) was correct as a matter of law. It also was correct as a matter of policy.

Special districts, like all local governments, operate their property – including tanks, reservoirs, treatment facilities, pump stations, administrative buildings, maintenance yards, excess property owned in fee and pipeline infrastructure located in easements and in public rights-of-way – effectively as a private property owner would. This is consistent with the powers granted to special districts by their originating statutory authorities. In many cases, such districts possess property, easements and rights-of-way that are not generally open to the public for transit

or public use in the same way as a street, with many of the easements and rights-of-way subject to use restrictions.

As one example of the significant and unique obligations facing special districts, it is helpful to consider the case of water districts, which must, among other things, protect their clean water supply against security threats, tampering and disruption.[165] This may involve the use of sensors, gates, lighting and a host of other security measures designed to protect district property. Such districts must ensure they can easily access their facilities, and provide that such facilities are maintained in secure and reliable working order. For safety, operational and other reasons, such districts therefore, must be able to strictly control, on a case-by-case basis, the placement of any third party facilities on such public property. Because a facility's failure could profoundly affect water customers and the wider community, such districts cannot manage their property on a theory that any harms can be corrected later and are of little consequence.

As another example, special districts such as the North County Fire Protection District, which provides fire and emergency medical services in an approximately 132 square miles area in Southern California, must be able to strictly control, on a case-by-case basis, access to its property, and placement of any third party facilities to ensure the conditions and measures are in place to protect its property and to ensure any use of its property by third parties does not interfere with their services.

[165] The events of September 11, 2011, prompted enactment of two major laws that addressed the security of the nation's critical infrastructure: The Homeland Security Act of 2002 (107 P.L. 296, 6 U.S.C., § 101 *et seq*.) which broadly addressed critical infrastructure protection, and Title IV of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (107 P.L. 188, 42 U.S.C., § 300i), which specifically addressed improving the safety of drinking water supplies. To address risks, special districts have had to revise contract provisions associated with the placement and activities of wireless facilities so they do not interfere with the operation of water systems or create security risks. Contractual provisions and adjustments have included limitations on the hours sites can be accessed; increased monitoring; new supervisory requirements; prohibitions on assignment, transfer of interests or co-location of facilities; and strict limitations on the right of wireless carriers to modify a facility. It is critical for districts subject to these laws to be able to retain sole discretion over the use of the property in their control.

Importantly, because of the numerous restrictions on their ability to set customer rates, special districts use the funds they collect through such licensing or leasing their property to maintain affordable customer rates, to provide special services such as offsets for low-income customers, and to improve and maintain valuable infrastructure.[166]

Finally, the lease of property for a telecommunications use is a secondary function. Making it a primary function by mandating access would impose significant staff and transactional costs; among other things, for example, the improvement of facilities would become more complex, because improvements would need to be coordinated with potentially multiple providers. It therefore becomes critical that special districts have maximum flexibility to grant or not grant access to facilities, at charges and rents and subject to terms set by the district – otherwise, the incentive will be to deny access altogether.

IV. UNREASONABLE DISCRIMINATION

A. "Asymmetric Treatment" That Imposes "More Burdensome Treatment" On Telecom-Related Deployment Than Non-Telecom Deployments Does Not Violate Sections 253 And 332(C)(7).

The Commission asks commenters to "identify any State or local regulations that single out telecom-related deployment for more burdensome treatment than non-telecom deployments that have the same or similar impacts on land use, to explain how, and to address whether this type of asymmetric treatment violates Federal law."

We begin by noting that Section 253 does not apply to wireless deployments, and hence the only non-discrimination provision that applies to wireless refers to discrimination among

[166] *See* for example the following comments filed *In The Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WT Docket Nos. 13-238, 13-32; WC Docket No. 11-59 (Apr. 7, 2011): Comments of The Valley Center Municipal Water District (filed Dec. 23, 2013); Reply Comments of The Valley Center Municipal Water District (filed Sept. 29, 2011); Comments of Sweetwater Authority (filed Feb. 3, 2014); Reply Comments of Sweetwater Authority (filed Sept. 27, 2011); and Comments of the Padre Dam Municipal Water District (filed Jan. 27, 2014).

"functionally equivalent" wireless providers (discussed in more detail in the following section). It also bears emphasizing that Section 253 only preempts regulations that prohibit the provisions of a telecommunications service. Presumably even the FCC does not believe all discriminations between wireline and wireless are prohibitory, since it suggests that undergrounding requirements, even if applicable to wireline, may not apply to wireless. If a prohibition is shown, then and only then would one ask whether a regulation fell outside the safe harbor or Section 253(c) because it was "discriminatory."

In this case, the Commission's question is answered by Section 253(a). Because the only regulations are those that prohibit the provision of telecommunications service; and because there is no obvious reason why treating a gas company differently than a telephone company prohibits the telephone company from providing telephone service, there is no reason why Section 253 would come into play.

And as a factual matter, telecommunications deployments are often subject to more favorable treatment, starting with the Commission's shot clocks. Under many state laws, telephone companies pay less for access to rights of way than other companies, such as cable companies. Smart Communities will address the specifics of any requirements that may be identified in response to the Commission's question.

Indeed, neither Section 253 nor Section 332(c)(7) require local governments to treat different types of telephone or personal wireless companies identically. The concern in Section 253(c)'s safe harbor is with rough parity between telecommunications competitors,[167] not

[167] The courts have recognized that local governments can charge providers different fees and still qualify for the Section 253(c) safe harbor. The Second Circuit has emphasized that "[t]he statute does not require precise parity of treatment." Thus:

> [A] city can negotiate different agreements with different service providers; thus, a city could enter into competitively neutral agreements where one service provider would provide the city with below-market-rate telecommunications services and another service provider would have to pay a larger franchise fee,

between telecommunications providers and non-telecommunications providers. Even if Section 253(c)'s safe harbor is applicable to "asymmetric treatment" between telecommunications and non-telecommunications providers, Section 253(c)'s safe harbor is applicable unless there is a significant imbalance; and if the difference in treatment is not justified.[168] Some cities, for example, grandfather existing facilities; distinguishing between existing and new facilities is not discriminatory.[169] As the Commission is aware, many ordinances provide for exceptions processes that permit, for example, wireless facilities to exceed height limits that otherwise apply, and with which wireline facilities do comply.

Section 253(c) is not suited to a *per se* rule that mandates equal treatment even if one could be established – and it cannot, consistent with the limits on Commission authority under Section 253(d).

B. Local Governments Have Spent Millions Of Dollars Implementing Their Undergrounding Programs Motivated By A Desire To Improve Their Communities, Not To Gain Revenues For Use Of Their Poles And Infrastructure.

The Commission seeks comment on the "extent to which localities may be seeking to restrict the deployment of utility or communications facilities above ground and attempt to relocate electric, wireline telephone, and other utility lines in that area to underground

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provided the effect is a rough parity between competitors. (*In re Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements*, 15 FCC Rcd. 16720 at ¶ 23 (July 13, 2000) (it is not unlawful discrimination to "differentiate among users so long as there is a valid reason for doing so."); *see also Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993).)

[168] *In re Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements*, 15 FCC Rcd. 16720 at ¶ 23 (July 13, 2000) (it is not unlawful discrimination to "differentiate among users so long as there is a valid reason for doing so."); *see also Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1064 (D.C. Cir. 1993).

[169] *Cablevision of Boston, Inc. v. Pub. Improvement Commission of the City of Boston*, 184 F.3d 88, 103 (1st Cir. 1999) ("[a]s long as the City makes distinctions based on valid considerations, it cannot be said to have discriminated….").

conduits."[170] The Commission also seeks comment on parties' experiences with undergrounding generally and with undergrounding requirements, including how wireless facilities have been treated in communities that require undergrounding of utilities.[171] The Commission states, "Obviously, it is impossible to operate wireless network facilities underground. Undergrounding of utility lines seems to place a premium on access to those facilities that remain above ground, such as municipally-owned street lights."[172] There are two implications inherent in this statement. The first is that the only way to provide service to an undergrounded area is to place wireless facilities aboveground in the public rights-of-way. That is not true. In many communities, wireless facilities could easily be placed on private property, or even on non-public right-of-way public property that would allow coverage in undergrounded areas (stealth facilities may be used, for example). As the report of Dr. Cahill explains, the right of way is not a monopoly resource.[173] Where there are no alternatives, the unserved area could be quite small – hardly enough to prevent an entity from providing wireless services. The second implication of this statement is undergrounding of utility lines and facilities has been motivated by a desire to target the wireless industry as a revenue source. That is simply not the driver for undergrounding requirements or projects. To the contrary, communities have spent hundreds of millions of dollars to implement undergrounding programs out of necessity and for the public benefit.

For example, as described earlier, Myrtle Beach, a city integral to South Carolina's tourism industry, has planned, financed, and worked hard to develop a 10 mile commercialized Ocean Boulevard, its public beaches and Boardwalk, investing more than $100 million in public

[170] NPRM ¶ 98.

[171] NPRM ¶ 98.

[172] NPRM ¶ 98 (citation omitted).

[173] ECONorthwest Declaration, at p. 14.

improvements to streets, sidewalks, the boardwalk, underground utilities, deep-water ocean outfalls, public parks, new streets and new recreational spaces. The City of Myrtle Beach partnered with the local electric utility, Santee Cooper, to fund the removal of overhead utility lines from major public streets and thoroughfares, spending more than $30 million on that effort since 1999.

Most of the tourists who visit Myrtle Beach arrive by automobile, but they rightly expect to walk and bicycle through the central beach areas and residential districts, which means that the City has a significant interest in minimizing obstructions in the public rights-of-way. Looking ahead, the City has identified as much as $2 billion of required road improvements, while facing significant reductions in available state and federal funding – additional infrastructure that may make improvements more difficult simply adds to those costs. Indeed, understanding these future growth issues, the City met with all interested utilities during the underground conversion discussion to ensure that the underground infrastructure would include sufficient conduit and other structures to avoid future trenching, road blockages or other retrofitting.

On a practical level, such a holistic approach is required for public safety. The Myrtle Beach area is subject to hurricanes, so it seeks to avoid preventable damage and limit repair time through strict building codes and adherence to FEMA's and other agencies guidelines. An obvious goal is to limit the number of structures that can create hazards to the public and to property during high winds. Moving utilities underground was part of those efforts.

In California, the California Public Utilities Commission ("CPUC") and utility companies established a program to underground utilities across the State of California in 1967. Under this program, utilities annually allocate approximately two percent of their electric revenue to communities to underground electric and telecommunications facilities, and upon

completion of an undergrounding project, utilities record their costs in their electric plant account for inclusion in its rate base. The CPUC then authorizes the utility to recover the cost from ratepayers until the project is fully depreciated.[174] Even with this program, the amount of undergrounding of existing facilities is minimal. The CPUC website states: "California has approximately 25,526 miles of transmission lines, approximately 239,557 miles of distribution lines, in which approximately 152,000 miles of distribution lines are overhead. Utilities convert less than 100 miles/year to underground. Therefore, if our program remains at the current progress, it will take over a thousand years to convert our entire distribution system to underground."[175]

Under the CPUC process, undergrounding projects are selected after consultation with the utility and after holding a public hearing. Projects must be determined to be in the public interest considering a number of criteria, including, but not limited to:

- Avoiding or eliminating an unusually heavy concentration of overhead electrical facilities.
- A street intensively used by the general public and carrying a heavy volume of pedestrian or vehicular traffic.
- A street passing through a civic area or public recreation area or an area of unusual scenic interest to the general public.
- A street considered to be an arterial or major collector.
- Projects that front city facilities such as parks, libraries, and fire stations.
- Projects in the downtown core.[176]

As seen from these examples, local governments have spent a significant amount of funds and resources for their undergrounding programs with the goal of improving their communities, not to gain any rental revenues or to market the use of their infrastructure by wireless or DAS providers. Indeed the hundreds of millions of dollars spent on undergrounding highlight that the

[174] http://www.cpuc.ca.gov/General.aspx?id=4403.

[175] http://www.cpuc.ca.gov/General.aspx?id=4403

[176] http://www.cpuc.ca.gov/General.aspx?id=4403.

benefits to their communities, whether it is improving utilities services to residential and commercial areas, increasing safety for vehicular and pedestrian traffic, or improving the aesthetic quality of the neighborhood, are well worth the financial and administrative costs.

And regarding the Commission's concern, there is no evidence that the right-of-way management and undergrounding programs administered by localities have impeded wireless deployment. Rather, significant broadband and wireless deployment has been achieved without compromising other important policy goals that make those communities very desirable places to live and work. The Commission should keep in mind these undergrounding programs that provide such benefits are tailored to the unique needs and desires of the local communities. Thus, any attempt by the Commission to step in and apply a national one-size-fits-all regime that ignores the local needs and desires of individual communities would be a travesty – and certainly not consistent with the goal of protecting local authority.

C. Undergrounding Programs Do Not Result in a *Per Se* Effective Prohibition Because Wireless Facilities Can Operate Outside the Public Rights-of-Way.

The Commission asks whether there is a particular way Section 253 or Section 332(c)(7) should apply in circumstances where undergrounding appears to place a premium on access to above-ground facilities and whether "'undergrounding' plans 'prohibit or have the effect of prohibiting' service by causing suitable sites for wireless antennas to become scarce."[177]

We repeat: Section 253 does not apply at all. But as discussed in the preceding section, undergrounding programs could not possibly result in a *per se* effective prohibition under Section 253 or 332(c)(7) because though wireless services cannot operate underground, they can operate outside the public rights-of-way. What are at issue legally in Sections 253 and 332(c)(7) are prohibitions and effective prohibitions, not hindrances.

[177] NPRM ¶ 98.

It also does not follow that *complete* blanket bans on overhead facilities in certain limited areas constitute "prohibitions." Neither Section 253 nor Section 332(c)(7) ensure that a provider will never have a service gap.[178] In many cases, a provider may be able to serve the same area by placing its facilities in less intrusive locations, in which case, no "gap" even occurs. Under a *per se* standard, a standard prohibiting facility placement on the National Mall would be *per se* unlawful (all utilities undergrounded), as would local rules that prohibit construction in an airline glide path, in historical areas, or in sensitive wildlife preserves. Sections 253 and 332(c)(7) do not give the wireless industry that sort of free rein, nor does it permit localities from placing certain areas off limits.[179]

D. The Commission Has No Authority to Undo or Rewrite Undergrounding Laws.

Finally, as a legal matter, the Commission, has no authority to undo or rewrite undergrounding laws in communities across the country. If the Commission were to regulate public right-of-way practices, it would raise serious constitutional issues.

First, reading the Act to compel the government to provide access and to allow the FCC to limit compensation would create significant takings issues.[180] The Supreme Court has clearly recognized a local government's "right to exact compensation" for such property uses:

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[178] *360 Degrees Communs. Co. v. Board of Supervisors of Albermarle County*, 211 F.3d 79, 87 (4th Cir. 2000) ("The Act obviously cannot require that wireless services provide 100% coverage. In recognition of this reality, federal regulations contemplate the existence of dead spots.").

[179] Additionally, there would be no effective prohibition even in those areas where undergrounding is required and wireless siting is forbidden. Communities that generally forbid siting in certain areas, such as residential areas, often provide that such limits are subject to a variance process. Under these processes, providers *can* place their facilities outside of public rights-of-way in these areas (e.g., on buildings adjacent to the public right-of-way or light poles on private parking lots), provided they can justify such a placement. This fits neatly with Sections 253 and 332(c)(7)'s "prohibition" law, which looks to the factual circumstances just as these local processes do.

[180] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430-433 (1982) (state law requiring property owner to permit access to cable company to install lines on private property constituted a taking).

> [W]hile permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental.[181]

And the Court has also held that like private property owners, local governments have the same right to fair market value compensation for the federal government's taking of property as private property owners.[182] It matters not that the intrusion may be relatively slight:

> [P]ermanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.[183]

Second, the preemption of local right-of-way practices and compensation would also offend the Tenth Amendment and the Guarantee Clause of the Constitution. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[184] As part of the system of "dual sovereignty," the federal government "may not compel the States to enact or administer a federal regulatory program."[185] Even in areas where the federal government has authority to act, the Constitution only authorizes the federal government to regulate individuals, not States.[186] If the Commission were to assume control over right-of-way practices or compel local governments to provide access to rights-of-way on federally-prescribed terms, the

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[181] *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 99 (1893), *op. on rehrg.*, 149 U.S. 465 (1893); *see also Cities of Dallas and Laredo v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997) ("Franchise fees are . . . essentially a form of rent: the price paid to rent use of the public rights-of-ways.").

[182] *United States v. 50 Acres of Land*, 469 U.S. 24 (1984).

[183] *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 430 (1982).

[184] U.S. Const. amend. X.

[185] *Printz v. United States*, 521 U.S. 898, 918-19, & 933 (1997) (*quoting New York v. United States*, 505 U.S. 144, 188 (1992)).

[186] *Alden v. Maine*, 527 U.S. 706, 714 (1999) (citing *New York v. United States*, 505 U.S. 144, 166 (1992)).

Commission would unconstitutionally commandeer the local administration of public property in service of a federal regulatory program.

The preemption of local discretion regarding how to charge for use of its property also raises concerns under the Guarantee Clause.[187] The Guarantee Clause precludes the federal government from interfering with a State's distribution of power among the various levels of government.[188] Where a State has decided to allow local governments to obtain certain fees, the Commission may not undermine the State's decision by leaving the local government without a means to recover that compensation. While the Federal government may use its Commerce Clause authority to limit certain actions of State and local officers, it may not—consistent with the unqualified *guarantee* to the people of the States of "a Republican Form of Government"—curtail the fundamental powers or property rights of local governments as local governments.

E. The Term "Functionally Equivalent Services" Refers Only To Personal Wireless Services, Which Means Utilities Services And Wireline Services Are Not "Functionally Equivalent" For Purposes Of Applying Section 332(C)(7)(B)(I)(I).

The Commission seeks comment on what constitutes "functionally equivalent services" in Section 332(c)(7)(B)(i)(I) and whether entities that are considered to be utilities can be viewed as an appropriate comparison. The Commission also asks whether, for the limited purpose of applying Section 332(c)(7)(B)(i)(I), wireless and wireline services be considered "functionally equivalent" in some circumstances, and which types of discrimination are reasonable and which are unreasonable.

1. *The Term "Functionally Equivalent Services" Refers Only to Personal Wireless Services, Which Means Utilities Services Are Not An Appropriate Comparison.*

[187] U.S. Const., Art. IV, § 4.

[188] *City of Abilene v. FCC*, 164 F.3d 49, 52 (1999) ("interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty").

According to the legislative history of Section 704 of the Telecommunications Act, one of the intentions behind Section 704 was to "insure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section unreasonably favor ***one competitor over another***."[189] The House Conference Report also states that the term "functionally equivalent services" refers "only to personal wireless services that directly compete against one another."[190] One court actually cited the legislative history to help define the term. The court stated:

> In our view, the phrase is reminiscent of the common question in antitrust cases whether two products are in the same relevant market. In each instance, the statute requires the decisionmaker to see if the two services (or products) are direct substitutes for one another and thus are in direct competition with one another. See also H.R. Conf. Rep. 104-458, at 208 (1996) (defining term to refer to services that directly compete against one another). In order to answer that question, it is common to compare the characteristics of the service or product, the price of each one, and the willingness consumers have shown to switch from one to the other when the price of one changes.[191]

Courts have interpreted the term in the following manner:

> We think the equivalency of function relates to the telecommunications services the entity provides, not to the technical particularities (design, technology, or frequency) of its operations. The TCA clearly does not force competing wireless providers to adopt identical technology or design nor does it compel them to fit their networks of antennae into a uniform, rigid honeycomb of interlocking cells. Indeed, the FCC's assignment of a different frequency and signal strength to each licensee renders such uniformity impossible. In this region, Sprint and Nextel provide the same service -- personal wireless communications

[189] H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 208 (1996), 1996 U.S.C.C.A.N. 124, 221-22 (emphasis added).

[190] H.R. Conf. Rep. No. 104-458, at 208, reprinted in 1996 U.S.C.C.A.N. at 222.

[191] *Aegerter v. City of Delafield*, 174 F.3d 886, 891-92 (7th Cir. 1999).

> services to remote users -- and therefore are functionally equivalent.[192]

Thus, the legislative history and the courts indicate that the term "functionally equivalent services" encompasses personal wireless services that directly compete against one another, which would rule out public utilities that do not provide such services as being an appropriate comparison.

2. *The Term "Functionally Equivalent Services" Refers Only to Personal Wireless Services, Which Means Wireline Services Are Not "Functionally Equivalent" For Purposes of Applying Section 332(c)(7)(B)(i)(I).*

For the limited purpose of applying Section 332(c)(7)(B)(i)(I), wireless and wireline services cannot be considered "functionally equivalent" in some circumstances. Courts have correctly rejected arguments made by wireless providers who have alleged unreasonable discrimination by citing a local government's differential treatment of providers of wireline services. For example, the Second Circuit held the following:

> Sprint's ability to compete with land-line based services simply is not part of the inquiry under subsection B [of Section 332(c)(7)]. Subsection B(i)(I) speaks only to Sprint's ability to compete with "functionally equivalent services," which does not include land-line services. See H.R. Conf. Rep. No. 104-458, at 208, reprinted in 1996 U.S.C.C.A.N. at 222 ("When utilizing the term 'functionally equivalent services' the conferees are referring only to personal wireless services that directly compete against one another."). Because subsection B(i)(II) only considers whether a town's decision will have the effect of prohibiting personal wireless services in a given area, Sprint's reliance on that subsection to contend that it cannot be prohibited from competing effectively with land-line systems is misplaced.[193]

Of course this does not mean that all providers must be treated identically. A locality

[192] Nextel W. Corp. v. Unity Twp., 282 F.3d 257 (3d Cir. Pa. Mar. 5, 2002) fn. 13; see also Omnipoint Communs. Enters., L.P. v. Zoning Hearing Bd. of Easttown Twp., 331 F.3d 386 (3d Cir. Pa. June 4, 2003); New Cingular Wireless PCS LLC v. Town of Stow, No. 06-10659-GAO, 2009 U.S. Dist. LEXIS 58837, at *12 n.1 (D. Mass. July 9, 2009); Omnipoint Communs., Inc. v. City of Scranton, 36 F. Supp. 2d 222, 235 (M.D. Pa. 1999).

[193] *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 639-40 (2d Cir. 1999).

could treat a large, visible proposed tower differently than a small one, and could require – as a least intrusive alternative – that a smaller less intrusive facility be used to minimize impacts. As the House Conference Report states:

> The conferees also intend that the phrase 'unreasonably discriminate among providers of functionally equivalent services' will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under the generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district."[194]

PART 4: INITIAL REGULATORY FLEXIBILITY ANALYSIS

For reasons suggested above, any shortening or alteration of the Commission's existing shot clocks (and especially any deemed granted remedy); any limitation on proprietary properties or regulation of their use will affect small local governments, special districts, property owners, and small developers and others harmed by placing everyone but wireless providers at the back of the permitting line. At a minimum, the cost will be in the hundreds of millions of dollars, to the extent it disrupts beautified neighborhoods, increases costs, or prevents development.

V. CONCLUSIONS

For the reasons discussed above, and in the expert declarations and reports, the Commission should not adopt additional rules or shot clocks directed at local governments; nor should it adopt additional deemed granted remedies or attempt to regulate proprietary property of any public agencies, local governments, or special districts.

It should work with industry and local governments on consultative processes like BDAC to develop models and best practices for deployment. It may also wish to clarify its rules to

[194] H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 208 (1996), 1996 U.S.C.C.A.N. 124, 221-22.

ensure that service and facilities providers are not incentivized to file incomplete applications; clarify its Section 6409 rules so that small cells remain small and subject to safety guidelines applicable to roads; and move forward to update its rules governing RF emissions.

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June 15, 2017